REPORT OF THE CONSTITUTIONAL REVIEW COMMISSION. (2005)

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CHAPTER 1

Historical Overview

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 thirty three 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'[1]. 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

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[1] *It is to noted that throughout this Report the correct name of this Territory has been used.*

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. Kitts. Colonel William Stapleton, was appointed Governor, in 1672 of the new English colony of the Leeward Islands, and 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.

1.7 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 impacted negatively 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.

1.8 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.

1.9 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 any one prepared to attack such settlements. Settlements in the Virgin Islands were in constant danger, given their proximity to Puerto Rico.

1.10 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

1.11 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

1.12 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 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"[2] 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.

1.13 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.

1.14 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,

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[2] *A History of the British Virgin Islands by Isaac Dookhan; pg 21.*

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.

First Constitution

1.15 By 1734, it became evident that the principal islands required institutions to administer justice and governance. As Governor of the Leeward Islands Colony, Governor Mathew made appropriate provisions for the establishment of councils and assemblies in Tortola and Virgin Gorda in early 1735. Each Council consisted of six (6) and each Assembly of nine (9).

1.16 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.

1.17 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.

1.18 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.

1.19 It was subsequently realized that Governor Mathew 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.

1.20 The appointment of Lieutenant–Governor James Purcell 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 property qualification and recognized the need to involve the public in matters of taxation. However, his enthusiasm for advancement in civil government was not shared by 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

1.21 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.[3] 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"*[4]

1.22 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. This structure reflected the one already established in other territories within the Leeward Islands and the British system as a whole.

1.23 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

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[3] *A History of the British Virgin Islands by Isaac Dookhan; pg 28.*

[4] *Ibid: pg 30.*

produce and this was made a condition of the undertaking to introduce representative government.

1.24 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.

1.25 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.

1.26 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) 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

1.27 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.

1.28 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.

1.29 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.

1.30 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."[5]

1.31 Historians of this period (1756-83) usually refer to it economically as the "golden era". During this period slave population reached its peak at 9,000, with a white population of approximately 1,200.

Fourth Constitution

1.32 Settlement of the land tenure issue, 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.

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[5] *The Virgin Islands Story by Norwell Harrigan and Pearl Varlack; pg 54.*

1.33 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 legislation was passed permitting the right to vote for a representative in the assembly, who had to be a white freeholder.

1.34 Nevertheless, steeply declining electoral participation, due partly to a steady exodus of whites, led to increasing curtailment in legislative activity.

1.35 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.

Fifth Constitution

1.36 In 1871 a single federal colony comprising all the Leeward Islands and Dominica was created, but in the federal assembly the Virgin Islands was not represented by an elected member. The Virgin Islands lost the status of colony and became a presidency. 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. By 1902 the Federal Council abolished the local council, bringing the status of the Territory back to what it was in the beginning. In the words of Harrigan and Varlack:

> *"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"*[6]

Sixth Constitution

1.37 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

[6] *The Virgin Islands Story by Norwell Harrigan and Pearl Varlack; pg 55.*

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"[7].

1.38 The Civic League was backed by the British Virgin Islands Pro-Legislative Committee of America. Together they began to demand the reinstitution 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"[8].

1.39 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.)

1.40 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.

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[7] *Life Notes by Joseph Reynold O'Neal, pg 44.*

[8] *Life Notes by Joseph Ryenold O'Neal, pg 45.*

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"*[9].

1.41 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.[10] 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.

1.42 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 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.

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[9] *The Virgin Islands Story by Norwell Harrigan and Pearl Varlack; pg 159.*

[10] *Memoirs of H.R. Penn by H.R. Penn pg 26.*

Seventh Constitution

1.43 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.[11] The recommendations provided for five constituencies and six elected members, two members representing the Road Town constituency.

1.44 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.

1.45 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.

1.46 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.

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[11] *Memoirs of H.R. Penn by H.R. Penn pg 30.*

Eighth Constitution

1.47 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 lead 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.

1.48 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".

1.49 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.

1.50 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.

1.51 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

1.52 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"[12] 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.

1.53 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' 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 been defeated, H.L. Stoutt was selected as leader and appointed by the Administrator as the first Chief Minister of the Virgin Islands.[13]

1.54 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.

1.55 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

[12] *The Virgin Islands Story by Norwell Harrigan and Pearl Varlack: p50*

[13] *Ibid: pg 172.*

that seat he offered the office of Chief Minister to Mr. W. Wheatley who had run and won, as an independent candidate.

1.56 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 impacted on governance capacity.

1.57 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.

1.58 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.

1.59 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.

1.60 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.

1.61 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.

1.62 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.

1.63 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. These were 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.

Ninth Constitution

1.64 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.W Wheatley again emerged as Chief Minister, but with a different team.

1.65 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.

1.66 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'.

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;

- Chief Minister to be appointed by the Governor on the recommendation of the elected 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;

- 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.

1.67 The usual procedure to secure such constitutional changes entail the Secretary of State for Foreign and Commonwealth Affairs inviting a delegation to London for talks on the issues and amendments being sought.

1.68 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 indigenous 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.

Impact of Constitutional Change on Economic Growth and Development.

1.69 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.

1.70 A population growth, stagnant for one hundred (100) years, suddenly took-off in the

1970s' and grew at a substantial pace over the next twenty (20) 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.

Population Size and Growth, Census Years 1871 to 1991

Years	Population			Sex Ratio	Average Annual Increase
	Male	Female	Total		
1871	3,379	3,272	6,651	1.03	..
1881	2,583	2,904	5,787	0.96	-136
1891	2,140	2,499	4,639	0.86	-65
1901	2,254	2,654	4,908	0.85	27
1911	2,613	2,949	5,562	0.89	65
1921	2,335	2,747	5,082	0.85	-48
1946	3,146	3,359	6,505	0.94	57
1960	3,930	3,991	7,921	0.98	101
1970	5,131	4,541	9,672	1.13	175
1980	5,617	5,368	10,985	1.05	121
1991	8,258	7,850	16,108	1.05	466

Source: Population Affairs and Social Statistics Division, Development Planning Unit

The economic activity sectors are highly indicative of rapid growth in the areas already identified.

The second table of data shows sectoral activities which became involved in driving the

economy.

British Virgin Islands Gross Domestic Product by Economic Activity at Factor Cost (US$ Million)

Economic Activity Sector	1984	1985	1986	1987	1988	1989
Agriculture	3.56	3.66	3.73	4.35	4.40	4.76
Mining and Quarrying	0.11	0.16	0.16	0.21	0.24	0.30
Manufacturing	2.27	2.31	2.87	3.45	3.73	4.30
Electricity and Water	2.68	2.87	3.60	4.10	4.78	5.21
Construction	6.83	5.91	5.43	6.53	7.34	9.45
Wholesale and Retail Distribution	6.48	6.61	7.17	7.56	8.06	11.20
Hotels and Restaurants	16.76	18.0	18.97	24.63	26.14	28.25
Transportation and Communication	7.73	8.70	9.74	12.28	14.41	21.28
Banks and Insurance	5.49	5.94	6.25	7.30	8.20	10.63
Real Estate and Housing	15.26	16.50	17.29	18.72	19.32	20.58
Government Services	11.28	10.25	11.82	12.91	17.79	19.00
Other Services	4.61	4.70	4.82	6.00	6.29	6.50
Less Imputed Service Charge	5.16	5.21	5.27	6.52	7.18	9.01
G.D.P at Factor Cost	77.90	80.40	86.58	101.52	113.45	132.45
Growth Rate	-	3.2	7.7	17.3	11.8	16.7
Source: BVI National Accounts Statistics, 1984-1989						

The third table which further extends the data in terms of the Gross National Product, evidences 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.

GROSS NATIONAL PRODUCT
MILL OF US DOLLARS

	1988	1989	1990	1991	1992	1993	1994	1995	1996
GDP in purchasers' value	204.71	245.42	279.31	287.84	280.53	421.64	434.20	479.15	511.20
Net Factor payments from the rest of the world	-21.99	-24.49	-26.24	-26.59	-28.83	-40.1	-48.05	-45.4	-50.24
Gross National Product									
(GNP) in purchasers' values	182.72	220.93	253.07	261.25	251.70	381.54	386.15	433.75	460.96

Tenth Constitution

1.71 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.

1.72 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.

1.73 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.

1.74 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

1.75 Most of the recommendations made in the Report were dealt with in *The Virgin Islands (Constitution) (Amendment) Order 2000*. 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 is yet to be done.

1.76 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.

1.77 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 / Costa and the Wallace / Fergus / Penn Commissions. The field of candidates has broadened and quality of debates in the Legislature has improved.

Conclusion

1.78 The issues that challenge the Virgin Islands in the new millennium 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 prepared to deal with the 'bogeyman'.

1.79 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. It is understood that such a report has been completed in draft by a committee chaired by Mr. Douglas Wheatley.

1.80 It is precisely from this point that we are able to make the connection with the task that the present 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 breath 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 breath and depth is being eroded by European integration and internationally by treaty obligations, some of which have been demonstrated to be against the best interest of the Virgin Islands. Nowhere has this been better stated than 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 recognized 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 recognized UN Security Council resolutions calling them all 'Britain's international commitments' and positing a responsibility on the part of the Territories to observe them"[14]

1.81 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.

1.82 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."*[15]

1.83 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

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[14] *In an address delivered at the Wilton Park Conference on Britain and the Overseas Territories: Making the Partnership work. 25, Nov., 04.*

[15] *A History of the British Virgin Islands* by Isaac Dookhan p234

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.

CHAPTER 2

Terms of Reference and the Conduct of the Review

2.1 This a locally appointed constitutional review commission, (apparently the first since 1953), and the largest, in terms of membership, in the history of the Virgin Islands. It has come about as a direct result of the decision by Her Majesty's Government in the United Kingdom, to invite each of its Overseas Territories ("OTs") to appoint a local commission to review and make recommendations for changes to and advancement of their respective constitutions; itself a first. Although the decision was taken in 2001 and commissions were appointed and at work in several of the BOTs, it was not until 2004 that this invitation was acted upon in the Virgin Islands.

2.2 The decision to appoint a Commission to review the Constitution and approval of its membership, was made by Executive Council on 11th February 2004. Letters of appointment were issued by the Governor on 13th April 2004, after the primary administrative and other arrangements for the working of the Commission had been put in place by the Office of the Chief Minister. These arrangements included funding and the rental of suitable office premises for the Commission.

2.3 The members of the Commission, drawn from a cross-section of the Virgin Islands community and consisting of persons of various disciplines, educational backgrounds and experience, are-

Gerard St. C Farara Q.C. – Chairman
Stuart Donovan
Vance Lewis
Audley Maduro
Carvin Malone
Edison O'Neal
Elihu Rhymer
Joanne Williams-Roberts
Persia Stoutt

The secretary *pro tem* to the Commission was Mrs. Tashi Maduro (nee O' Flaherty).

The substantive secretary, Miss Kimberly Crabbe, joined the Commission as from 7th June, 2004.

2.4 The Commission was publicly launched by The Hon. Dr. D. Orlando Smith, Chief Minister, at a press conference held at the Chief Minister's Conference Room on 26th April, 2004 at which remarks were made by the Chief Minister and the Chairman of the Commission, and questions from the media entertained.

2.5 In his presentation, the Chief Minister referred to the Review as "*the single most important event to take place in this Territory and certainly in the life of this administration.*" He urged residents not to take it lightly as the Review has implications not just for their future, but that of their children. As regards the Constitution itself, the Chief Minister announced that copies of the document would be made available to every primary and secondary school in the Territory, as well as the general public. He challenged every Virgin Islander to read and familiarize themselves with the Constitution. He expressed a desire for the Constitution and its review to be "*discussed at dinner tables and in churches...the Halls of Government...at the taxi stands and in the hotels, the business offices and on the piers.*" He charged the Commission and the public, when addressing their minds to changes to the Constitution, to not confine their thinking to the short term, but rather to consider where the Territory ought to be in the next 20 years.

2.6 In his remarks, the Chairman emphasized that the Review requires the full participation of the public if it is to be meaningful. In appealing for the active, informed and constructive participation of the public, through the various avenues to be made available to them for expression of their will and recommendations, the Chairman opined- "*A constitution must be reflective of the level of development of the country and the aspirations of its people.*" The public was urged to acquaint themselves with the Terms of Reference and the Constitution, including recent amendments.

2.7 The Terms of Reference of the Commission are:-

To conduct a review of the Virgin Islands (Constitution) Order 1967 (UK SI No. 2145) with a view to ensuring the British Virgin Islands' continued advancement and good governance and, in particular, to review the following:

(1) *The duties of the Attorney General as the chief legal adviser to the Government and also as public prosecutor, with a view to separating those duties and reposing the function of public prosecutor in a Director of Public Prosecutions.*

(2) *The provision for a clear definition of "a Belonger", in particular persons who may be deemed to belong to the British Virgin Islands, but who may not enjoy BOTC status under the British Nationality Act 1981, with the entitlement to a passport that such status offers;*

(3) *The protection of the rights and privileges of the indigenous people of the British Virgin Islands, by limiting the ability of non-indigenous persons to hold elected office.;*

(4) *The introduction of a sixth ministerial position in light of the increase in the size of the Government and the need to ensure greater efficiency and productivity;*

(5) *The need for a human rights chapter in the Constitution;*

(6) *Having regard to the reserve powers of the Governor, to consider the feasibility of scaling down those powers and establishing a viable system of checks and balance to ensure continued good governance; and*

(7) *Considering the existing system relating to the functioning of the Executive Council, to provide a critical analysis on the feasibility of establishing a cabinet system of government for the British Virgin Islands.*

2.8 The Commission was required to submit a first draft of its Report within nine months of appointment, and the final report within one year. However, by January 2005, the Commission was still facilitating public consultation. An extension to 28th February 2005, requested by the Commission to submit its draft Report, was approved by Executive Council on 19 January, 2005. The final Report has been submitted within the stipulated period.

2.9 It is to be observed that the Terms of Reference calls for a review of the entire Constitution, in addition to the seven specific issues which Executive Council identified for particular treatment. It is on this basis that the Commission set about and conducted the Review.

2.10 The Commission's first meeting was held on 23rd April, 2004, within a week of its appointment, and some days prior to the formal launching ceremony.

2.11 The Review was conducted on the basis of public consultations which consisted of public meetings, radio and television programmes, including call-in programmes, written submissions from the public and others, and meetings with certain functionaries and groups by invitation. Of course, the Commission held its own regular meetings.

2.12 Prior to the appointment of the Commission, there was no initiative undertaken to inform, educate or sensitize the public in general either as to the Constitution itself or the process of a review. In the Commission's view, this made the Review and, hence, its task a more onerous one, although the Commission did not allow this to adversely affect the conduct of the Review.

2.13 Accordingly, the Commission recognized from the beginning of the Review, that it would be necessary for the Commission itself, as part of the Review process, to embark upon a programme aimed at educating and informing the public generally regarding the present constitutional status of the Territory, the more salient provisions of the Constitutional Order, the organization and inter-relation of the three branches of government, and some elements of constitutional theory and practice. In short, to acquaint the public with the Constitution so as to engender informed and constructive contributions and recommendations.

2.14 Another objective of this aspect of the exercise, was to regularly publicize the Review so as to engender active participation by a wide cross-section of the public. This led, with the co-operation and facilitation of the broadcast media and the respective programme hosts, to multiple appearances by Commission members on many of the popular radio and television call-in programmes. In this regard, the Commission is indebted to Mr. Cromwell Smith the host of "Umoja" who, for a period of several months, dedicated this programme, every other week, to one or more of the Terms of Reference in the Review. We are also indebted to our own Commission member, Mr. Elihu Rhymer, who dedicated many of the "Hot Seat" programmes to issues, the subject of the Review. We are also gratified by the assistance received from the Government Information Service (GIS) for the use of the television programme

"Public Eye", as a forum for promoting the Review, and solicitation of views and recommendations from the public. In all, Commissioners appeared on at least fifteen radio and two television programmes.

2.15 The Commission held ten public meetings throughout Tortola (including two in Road Town and one at the H. Lavity Stoutt Community College), two on Virgin Gorda, and one each on Anegada and Jost Van Dyke. The Commission also traveled to St. Thomas in the United States Virgin Islands, and met with Virgin Islanders at a meeting hosted by the League of Virgin Islanders there. A total of fifteen public meetings were held by the Commission. Attendance at these meetings ranged from 10 in Sea Cows Bay to 106 at our "mass" public meeting at the Sir Rupert Briercliffe Hall in Road Town on 20th January, 2005. The panellists for the latter meeting included the Chief Minister, the Leader of the Opposition, the immediate past Deputy Governor Mr. Elton Georges, and noted Virgin Islands' writers, Miss Eugenia O'Neal and Mrs. Medita Wheatley. Apart from this meeting, the highest attendance at any other public meeting was 63, at the first meeting on Virgin Gorda; an excellent turn out for such a relatively small community.

2.16 Regardless of the level of attendance at a public meeting, the Commission was pleased (and in some instances pleasantly surprised) with the level of participation by those attending and, in particular, the quality of the views and recommendations voiced. This made each such consultation meaningful and constructive to the Review. The usual format for such meetings (and one which the Commission found worked quite well with necessary modifications from time to time), included a short overview of the nature of the Review by the Chairman, followed by a presentation by a Commissioner on one of the seven specific issues in the Terms of Reference (which had been previously assigned to them) and, in each instance, by reaction and proposals from the audience.

2.17 The public were invited to speak, not just to the seven specific issues in the Terms of Reference, but to any matter related to the Constitution which they were concerned about and wished to advocate for change. Many individuals did avail themselves of this opportunity. The Commission also raised certain issues with the public. It is fair to say that any member of the public (be they Belonger or not), who indicated a desire to speak, were afforded an opportunity to do so. Several of the public meetings ran until almost mid-night.

2.18 Many persons present at the public meetings expressed, openly or privately, their gratitude to the Commission for the opportunity afforded them to participate in this important process, and for the perceived 'benefit' derived by them from the information imparted during, and the manner in which the meeting itself was conducted. It was not unusual for such gratitude to be expressed by vigorous applause for the Commission at the conclusion of such meetings. We say this not to heap praise upon the Commission and its members, but to indicate the feeling of pride which persons do experience when they are consulted, in a meaningful and timely way, on issues of importance to them, their families, their communities, and to the country at large, making them feel an important part of the 'democratic' process.

2.19 Having said that, there is one aspect of the conduct of the Review with which the Commission was somewhat disappointed. This relates to the number of persons availing themselves of the invitation extended to the public by the Commission, to either meet with or make written submissions/recommendations to the Commission. The invitation was first issued by the Chairman at the official launching of the Commission and the Review, and repeated many times thereafter via radio, television, at press conferences and at the public meetings. The Commission received some 13 written submissions, including from the Hon. Attorney General, the Chief Auditor and the out-going Chairman of the Civil Service Association. However, no member of the public took up our invitation to meet with the Commission. As a locally appointed Constitutional Review Commission, this is somewhat remarkable.

2.20 However, several functionaries did meet with the Commission in response to our specific invitation. Most notably, His Excellency the Governor Thomas Macan, who gave the Commission the benefit of his frank views and valuable insight into the workings of the executive branch of government. His Excellency also accompanied, Mr. Bill Rammell, MP, Undersecretary of State in the Government of the United Kingdom, when he met with the Commission. The Hon. Cherno Jallow, Attorney General, made himself available to the Commission on two separate occasions, and gave us the benefit of his views and insights on a range of constitutional issues, particularly the first specific issue in the Terms of Reference (whether a constitutional office of DPP). He also presented written submissions which the Commission found most useful.

2.21 We also wish, in this context, to record the Commission's appreciation to the 'top brass' of the Royal Virgin Islands Police Force, led by acting Commissioner of Police Reynell Frazer, for meeting with the Commission and assisting us with the issue of whether Internal Security and the Police Force, in particular, ought to be removed as one of the Governor's 'special responsibilities' under section 19 of the Constitution. Likewise, we are most appreciative of the very helpful views canvassed at the Commission's two meetings with the 'Top Managers' of the Public Service led by the Deputy Governor Mrs. Dancia Penn Q.C., particularly on the question of whether responsibility for the Civil Service ought similarly to be removed as one of the Governor's special responsibilities.

2.22 The Commission also held discussions with Mr. Michael Bradley, the United Kingdom's Constitutional Adviser to the Overseas Territories, and with Professor Ralph Carnegie, a leading lecturer, constitutional scholar and the Executive Director of the Caribbean Law Institute Centre at the University of the West Indies, who met with us in his capacity as a consultant to the Organisation of Eastern Caribbean States (OECS).

2.23 Of great significance, is the Commission's meeting with the Members of the Legislative Council at the office of the Council on 20th December, 2004. This meeting, lasting some six continuous hours, was attended by the Speaker, the Chief Minister, all other Ministers of Government, the Leader of the Opposition and most other sitting Members. It was a useful meeting particularly since Members of the Council had been holding their own meetings together on the Terms of Reference, resulting in substantial unanimity of position on most of the specific issues. This meeting afforded Members of the Legislative Council the opportunity for an exchange of views and testing of positions with the Commission. The end result was the submission to the Commission on 2nd January 2005 of a 'Position Paper', emanating from the Members of the Council. Because of its obvious importance, a copy of this document is Appendix 2 to this Report. The Commission found the Position Paper most useful and was in accord with many of the recommendations expressed therein. However, the Commission was unable to agree with some of the specific recommendations and, in some instances, with the justifications or premise for certain of the conclusions, for the reasons stated elsewhere in this Report.

2.24 The Commission has met and deliberated no fewer than 55 times. Meetings have been

held almost every week since its appointment, at times twice a week, often with added public appearances during such weeks. The exercise has been one which the Commissioners will remember, if not cherish, for the rest of their individual lives. It represented a 'signal' opportunity, to participate, at a high level in an exercise of this nature, which can be so important to constitutional advancement, nation building, and the strengthening of our democratic institutions and the rule of law. For some Commissioners it represented a 'steep' learning curve, as far as acquainting themselves with the provisions of the present Constitution, with the constitutions of other countries be they other BOTs or independent states, and an ever increasing body of reference material gathered for the conduct of the Review.

2.25 In its deliberations, the Commission, in addition to examining the Virgin Islands (Constitution) Order 1976 and the amendments thereto, considered the constitutions of several other countries and territories, the previous two constitutional commissioners' reports, other locally produced reports such as the 1997 Report of the Committee to Re-define Belonger Status, and relevant local legislation.

2.26 This Review was conducted against the backdrop of the 1999 U.K. Government's White Paper on *Partnership for Progress and Prosperity*, which is intended to usher in a new approach in the relationship between Britain and its Overseas Territories. It lays out, for the first time, the principles which are to underlie and govern that relationship. This 'modern partnership' is to be rooted in four fundamental principles, which bear repeating here. They are:-

- self-determination;
- mutual obligations and responsibilities;
- freedom for the territories to run their own affairs to the greatest degree possible;
- a firm commitment for the UK to help the territories develop economically and to assist them in emergencies.

2.27 At the core of this initiative by Britain is 'modernization' to meet and conform with its new international role and obligations, *"recasting the constitutional settlement to bring power close to people"*, while upholding the right of the individual territories *"to*

determine their own future and enjoy a high degree of autonomy." It is against this 'new approach' that Britain embarked upon a deliberate process whereby each Overseas Territory was invited to review its constitution. These constitutional reviews are to reflect *"a balancing of obligations and expectations."* The matters which are to be addressed include-

- Measures promoting more open, transparent and accountable government;
- Improvements to the composition of legislatures and their operation;
- Improving the effectiveness, efficiency, accountability and impartiality of the public service;
- The role of Overseas Territory Ministers and Executive Councils and their exercise of collective responsibility for government policy and decisions;
- Respect for the rule of law and the constitution;
- The promotion of representative and participative government;
- Freedom of speech and information;
- The provision of high standards of justice;
- Adoption of modern standards of respect of human rights.

2.28 The Commission is indebted to all those who responded, usually with promptitude, to our requests for copies of documents and various other material. We are also most grateful to those members of the public who accepted our invitation to be panellists at the two public meetings where that format was used, and for the encouragement extended by members of the public to the Commissioners, individually and collectively.

2.29 Of course, as a Commission we must record our profound gratitude to those two pleasant and extremely hardworking young ladies, Tashi Maduro and Kimberly Crabbe, who served at various times as Secretary to the Commission. Their invaluable work kept the Commission on track with the progress of the Review, enabling our various meetings to be properly organized and to run in a smooth and productive manner. The unenviable exercise of producing accurate minutes of what was said at the various meetings of the Commission, which have been many, was quite a Herculean task in itself, but one which was essential to the proper functioning and meaningful deliberations of the Commission and, ultimately, the preparation and finalization of this Report, itself a time-consuming exercise, which was ably and conscientiously carried out by Miss Crabbe.

2.30 We also record our gratitude to the staff of the Government Information Service ("GIS")

who assisted the Commission in many ways, including promoting and recording all our public meetings, and the publication of notices and advertisements in the local media.

2.31 The Commission also records our profound appreciation to all those who attended the public meetings or took part in the discussions, whether in person or via the broadcast media. We have listened attentively to all that has been said to us and sought, by our many questions and comments, to test ideas and recommendations. We feel certain that the Commission has accurately distilled and analyzed the body of opinions on the various issues in the Terms of Reference, and has discerned a consensus where such existed, on any particular issue. In so doing, we have attempted to reflect any such consensus, majority or minority, in the Report. We assure you all that the Commission has taken account of and given due weight to your individual views and submissions in coming to our recommendations, as set out in this Report.

2.32 After the draft report was submitted to the Governor for distribution to the members of the Executive Council, the Commission received a letter dated 11 March 2005 from the Governor with his comments and a detailed letter dated 17 March 2005 from the Attorney General with his comments and advice. The Commission considered both letters at its meetings on 30 March 2005 and 4 April 2005, as part of its deliberations leading to the finalization of the Report in accordance with the Terms of Reference.

CHAPTER 3

Separation of the duties of the Attorney General

ISSUE NO. 1 The duties of the Attorney General as the chief legal adviser to the Government and as public prosecutor, with a view to separating those duties and reposing the function of public prosecutor in a Director of Public Prosecutions.

3.1 This is the first of seven specific Issues which the Commission is charged by the Terms of Reference to consider. It involves a close and critical examination of the various roles, constitutional and functional, which the Attorney General of the Virgin Islands is required to execute. The core question is whether the 'post' of Director of Public Prosecutions within the Attorney General's Chambers, having finally been filled in 2004, ought to be separated out and made a constitutional office with the entrenchment and constitutional protection necessary to ensure its independence, as is currently applicable to the Attorney General as the chief public prosecutor. In considering this question, it is important to bear in mind that the overriding objective of the Commission in the conduct of the Review is to consider meaningful recommendations; change not just for the sake of change, but with a view to ensuring the *"continued advancement and good governance"* of the Virgin Islands.

3.2 This Issue is one of some vintage. It was addressed during the 1993 constitutional review. The 1993 Report recorded suggestions at that time by persons in the community, that constitutional provision should be made for the post of Director of Public Prosecutions, in whom would be vested the Attorney General's powers relating to prosecutions under section 24(1) of the Constitution. The then commissioners observed that the suggestion was based on the Attorney General's close association with the Executive Council, and on the need for more prosecutions to be handled by legally qualified staff, rather than by the police.

3.3 The 1993 commissioners were of the view that it *is "only when the post of Attorney General is filled by a political appointee that it becomes essential to transfer the authority to prosecute to a public officer such as a Director of Public Prosecutions"* Having concluded that there was no compelling need to make that fundamental change in the Virgin Islands at the time, the commissioners declined to recommend the inclusion in

the Constitution of the post of Director of Public Prosecutions. In doing so, they were satisfied that the existing level of staffing in the Attorney General's Chambers, with the then recently created post of Director of Public Prosecutions and four Crown Counsel, ought to be sufficient to ensure that prosecution of the more serious criminal cases is undertaken by legally qualified prosecutors.

3.4 However, it was not until the year 2004, that the post of Director of Public Prosecutions (without constitutional authority) was filled. Thus, in large measure, the prosecutorial functions of the Attorney General have been separated out and are being discharged by a Director of Public Prosecutions, although the Attorney General continues to be constitutionally responsible for such functions, and continues to enjoy, *ex officio*, the necessary protection from interference by other functionaries when discharging such duties.

3.5 The professional staff at the Attorney General's Chambers has grown from four Crown Counsel in 1993 to some twelve Crown Counsel today (excluding the Director of Public Prosecutions, Parliamentary Counsel and Assistant Parliamentary Counsel). In addition, there are three other posts to be filled, bringing the total number of posts for Crown Counsel in the Chambers to approximately fifteen. Of these lawyers, some four are assigned to the prosecution of criminal offences, and two of the unfilled posts are also so designated. When fully staffed, this would bring the complement of prosecutors to seven including the Director of Public Prosecutions.

3.6 The Constitution does not create the office of or provide for there to be an "Attorney General" of the Virgin Islands, as it does for the office of Governor (section 3(1)), Deputy Governor (section 4(1)) and Auditor (section 66(1)). However, it is a "Public Office" within the meaning of section 2(1) of the Constitution, "being an office of emoluments within the Public Service". Further, the office of Attorney General is one of the offices prescribed in section 65(5) of the Constitution to be specifically remunerated. Appointments to the office of Attorney General is by the Governor in consultation with the Judicial and Legal Service Commission and, by convention, with the approval of the Secretary of State. By virtue of the Constitution, the Attorney General is a member of the Executive and Legislative branches of government, and the chief public prosecutor of the Crown.

3.7 As is readily apparent, the Attorney General wears many hats, some prescribed by the

Constitution and others by virtue of the office or as prescribed by legislation. By virtue of the Constitution he is a member of Executive Council (section 14), an *ex officio* member of the Legislative Council (section 26) and, chief prosecutor - being the office which has sole authority to institute, take over and discontinue criminal proceedings. By section 24, the prosecutorial powers are vested in the Attorney General to the exclusion, and is not subject to the direction or control, of any other person or authority. Furthermore, the Attorney General is a member of the Mercy Committee (section 11), and is one of three categories of persons with standing to petition the High Court to determine whether any person has been validly elected to the Legislative Council or has vacated his seat therein (section 49). Additionally, the Attorney General is the chief legal adviser to the Government, including the Governor and Executive Council, chief legislative draftsman, legal adviser to the Legislative Council and, at times, to the members in the Opposition. By virtue of his position as principal legal adviser of the Crown, and by English legal tradition, the Attorney is an officer of the court and titular head of the Bar.

3.8 In the conduct of the Review, the Commission received submissions and different points of view regarding this Issue from a large number of persons. These included the Governor, the Members of the Legislative Council, the incumbent Attorney General, the Auditor, other public officers and, of course, the general public.

Recommendations by Members of the Legislative Council

3.9 In their Position Paper, the Members of the Legislative Council took the position that there should be a Minister with responsibility for matters of justice and "for any other subjects assigned to him by the Chief Minister", whether styled "Minister of Legal Affairs", "Minister of Justice" or "Minister of Home Affairs". In making this recommendation, Members of the Legislative Council support the creation of a constitutional office of Director of Public Prosecutions ("DPP") with the transfer to that office of all the powers and protections in section 24. The DPP would be appointed through the Judicial and Legal Service Commission process. Members of the Legislative Council also recommend that the Attorney General be accountable to the Minister of Justice and the office of DPP should have *"clearly defined lines of accountability to the Minister of Justice/Legal Affairs/Home Affairs."* As regards the DPP, they recommend in these terms-

"there shall be put in place a system of transparent checks and balances by way of guidelines to ensure impartiality, and to prevent any potential political interference or abuse in the exercise of the powers of the DPP, affording him/her the necessary prosecutorial independence, and providing for sanctions for such political interference or abuse."

3.10 Members of the Legislative Council were also of the view that there should be in place a system for review of the performance of the DPP. They recommend-

> *"given the need for the prosecutorial independence of the DPP, there should be provision for an independent and effective review of performance, as a safeguard in the Territory's best interest within the Criminal Justice system, against an overzealous or indifferent DPP."*

3.11 Members of the Legislative Council also recommended that the Attorney General should *"preferably be a belonger"*. In addition, to the office of DPP, Members of the Legislative Council recommended the creation of the post of Deputy Attorney General or Solicitor General, who will be next in line to the Attorney General and *"shall be a belonger."*

3.12 Members of the Legislative Council further recommended that the Attorney General be removed as a member of both the Executive Council and the Legislative Council, to be called upon for advise by either body as the need arises. However, they countenance the Attorney General remaining a member of the Mercy Committee, since that office will no longer have responsibility for criminal prosecutions.

3.13 Finally, Members of the Legislative Council recommended the expansion of the membership of the Judicial and Legal Service Commission from its present three members, to include another two *"fit and proper"* persons from the Virgin Islands.

3.14 These recommendations from Members of the Legislature, would represent a significant shift in emphasis and responsibility for matters relating to *"justice"* from the Governor to the political directorate, and the further streamlining of the executive and legislative branches of Government so as to provide for membership to be limited to the elected representatives. Following past reviews, we have seen the removal of the Financial Secretary from membership of these two branches and of *"nominated members"* from

membership of the legislative branch.

3.15 As regards the third branch of government, the Judiciary, its independence is safeguarded from political influence through legislation providing for the appointment of judges and the jurisdiction and functioning of the Courts. The Governor is constitutionally responsible for the conduct of any business of the Virgin Islands, and for any department of government with respect to, "the administration of the courts" (section 19). Hence, matters relating to the operation of the Magistrate's Court established under the Magistrates' Code of Procedure Act, fall within the Governor's responsibilities. Likewise, matters relating to the High Court Registry, and the staffing and equipping of the offices of the High Court, fall under the Governor's responsibilities. His responsibility for these matters are dealt with in Chapter 8 and appropriate recommendations made there.

3.16 While the Commission has recommended that there be a sixth Minister, and that such Minister may be styled "Minister of Home Affairs", it does not recommend, at this stage of our political development and maturity, and mindful of the 'separation of powers' doctrine, that responsibility for matters of justice, the courts and legal affairs be reposed in a political appointee, whether styled "Minister of Justice" or "Minister of Legal Affairs".

Views of the Public

3.17 In the present Review, the Commission found overwhelming support for separating the duties of the Attorney General as the chief legal adviser to the Government, from those of public prosecutor, and for reposing the duties of public prosecutor in an independent and constitutionally protected Director of Public Prosecutions. This view is based primarily on the perception that the public has or may have as to the independence of the Attorney General when discharging his prosecutorial functions where, in particular, a minister of government or member of the Legislature may be the subject of a criminal investigation. Because of the Attorney General's close association, by virtue of office, with Ministers and Members of the Legislative Council, the public may view any decision made or power exercised by him regarding such investigation or prosecution, with much scepticism, and might conclude that such decisions are in some way affected or tainted by

that close association. This perception is there notwithstanding that both the current and immediate past holders of that office, have given the assurance that there has been no attempt by the political directorate or anyone else, to influence the exercise by them of their prosecutorial function during their tenure of office.

3.18 The Territory has experienced in the last several years, some very high profile criminal prosecutions which led to the conviction and imprisonment of certain senior public servants for wrongdoing in office. These prosecutions have served to further highlight the importance of justice appearing to be done, as well as being done, and has served to underscore the importance of an independent and fearless prosecutor.

3.19 The present Attorney General accepts that the matter of public 'perception' is a real one and has come to the view, as expressed to the Commission, that good governance would be better served if the two functions were separated and responsibility for criminal prosecutions reposed in a constitutional office of Director of Public Prosecutions, with the necessary protections accorded to that office as currently provided by section 24 of the Constitution.

3.20 Some persons also based their recommendation for the separation of the prosecutorial functions of the Attorney General, on the demands on the office holder arising from the multiple functions and duties which he has to discharge, thereby minimising the kind of attention and actual involvement, administratively and otherwise, which the holder can give to the prosecution of serious crime. This may have implications for law and order and may adversely impact on the speed with which persons are brought to justice and afforded a fair trial.

3.21 One notable and distinguished Virgin Islander, at our meeting in St. Thomas, US Virgin Islands, felt strongly that there was no need for a separation of the responsibilities. He was firmly of the view that the prosecutorial functions should be retained with the Attorney General, who should continue to be in charge of all legal affairs. In his view, the size and resources of the Territory did not justify creating two separate offices with two separate bureaucracies. He viewed this as essentially a matter of recruiting the proper staff to meet the needs of the Territory in this area. Any special circumstances which arise, that may require the prosecution being handled by someone other than the Attorney General himself or his professional staff, ought to be referred by him to a 'special prosecutor'. We note that in the past, it has not been unusual for Government to engage

leading counsel from the region to prosecute, on behalf of the Crown, certain major criminal cases. Indeed, the practice for years has been for the sitting Attorney General to not actually conduct criminal prosecutions in court, but to exercise his or her constitutional duty through crown counsels, with appropriate oversight from the office holder.

3.22 As mentioned above, the views expressed to the Commission were overwhelmingly to the effect that the prosecutorial function ought to be removed as one of the functions to be discharged by the Attorney General, and that function reposed in a Director of Public Prosecutions provided for in the Constitution, with the protection afforded to such person as is presently provided for in section 24. Having considered the various views, the Commission accepts that while the arrangement which exists from 2004, whereby the post of Director of Public Prosecutions has been filled by a suitably qualified prosecutor with professional staff assigned to that division, is a satisfactory one, the issue of perception and of independence in the discharge of the functions of the chief prosecutor under the Constitution, is of paramount importance to the administration of justice and good governance. This perception or concern is not, in the Commission's view, satisfactorily addressed by having a Director of Public Prosecutions who operates under the Attorney General, and is subject to the directive, control and constitutional authority of the Attorney General.

Constitutional office of DPP and Qualifications for Office

3.23 Accordingly, we **recommend** the complete separation of the prosecutorial functions and the reposing of these functions in a Director of Public Prosecutions established as an office under the Constitution, with the same constitutional protection afforded by sub-sections (3) and (5) of section 24. As regards costs, we consider that most of the attendant costs have already been incurred by the creation of the post of Director of Public Prosecutions within the Attorney General's Chambers, and assigning of the requisite number of Crown Counsel to the criminal division. Any additional costs relative to professional and non-professional staff and the rental of suitable office premises are, in the Commission's view, a justifiable price to pay for establishing the independence of the office as an important element of the delivery of justice, including the timely prosecution of offenders.

3.24 It is the **recommendation** of the Commission that the Director of Public Prosecutions should be appointed by the Governor acting on the advice of the Judicial and Legal Service Commission. The Constitution should also make provision for a qualified person to be appointed to act as DPP where the office is vacant or the holder is for any reason unable to exercise the functions of office. As to qualifications for office, we **recommend** that the Constitution provide for the holder to be a person qualified to be admitted as a Barrister-at-law (or Attorney-at Law) and to have practiced as such for at least seven years (see section 87 Constitution of Antigua and Barbuda).

3.25 We do not agree with the concept of the DPP reporting to a Minister of Government. This would, in our view, represent a bad precedent which must be avoided. In this regard, we note that no such requirement appears in the constitutions of any of the independent states of the Caribbean.

Discipline and Removal from Office

3.26 As to the review of the performance of the Director of Public Prosecutions and his possible removal from office, we consider that in any modern democratic society, the performance in office by any public officer must be subject to appropriate review and scrutiny, and misconduct of a serious nature ought, subject to following an established procedure, to lead to discipline and, ultimately, removal from this office. This represents an important check on misconduct and abuse of power. As the Commission considers that the DPP is likely to be a "contract" officer, a performance review will usually be conducted when his contract comes up for renewal by the Judicial and Legal Service Commission and the Governor. The Constitution should also provide for his removal in circumstances of gross inability to exercise the functions of office and for 'misbehaviour' in office; and we so **recommend**. However, such removal must be in accordance with a procedure prescribed by the Constitution, whereby the question of removal has been referred either to the Judicial and Legal Service Commission or some other independent tribunal established for such purpose and accorded constitutional status. We so **recommend.** It is our further **recommendation** that the Constitution should also provide that once the question of removal has been referred to the Judicial and Legal Service Commission or an independent tribunal, the DPP should be suspended from office pending the outcome of such procedure and a qualified person appointed to act in his stead.

The Attorney General

3.27 As regards the Attorney General, the Commission considers that the presence in both the Executive (Cabinet) and Legislative Councils of the chief legal adviser to Government and the Legislature, is both beneficial and prudent, and ought to be maintained. However, with the movement to a Cabinet system with a Cabinet Secretary, the Commission accepts the view expressed by some members of the public, that the Attorney General ought to be an *ex officio non-voting* member of the Cabinet, and we so **recommend**. Additionally, the Constitution must expressly establish the office of Attorney General in like manner as it currently provides for the office of Governor, Deputy Governor and Auditor. We so **recommend.**

3.28 Many members of the public strongly suggested that contemporary Virgin Islands' society requires that posts such as that of the Attorney General should be constitutionally reserved for qualified Belongers, in the first instance. This accords with the position taken by Members of the Legislative Council. While the Commission finds compelling reasons to support the suggestion, they also recognized the practical limitations on finding not only suitably qualified Belongers, but those willing to take up the mantle, even for a short period. Accordingly, we **recommend** that the Constitution provide for the office of Attorney General to be filled, in the first instance, by a suitably qualified Belonger. Only where such a person cannot be found or is not available, ought the position to be filled by someone else and, in such instance, only on contract.

Deputy AG or Solicitor General

3.29 As regards establishing, as a public office, the post of Deputy Attorney General or Solicitor General, the Commission agrees in principle with the position of Members of the Legislative Council, but considers the post of Solicitor General preferable, which accords with the view of the current Attorney General. The holder of the post, which would not be a constitutional office, would be responsible, *inter alia*, for the handling of the civil litigation work of the Chambers, and would be appointed to act as Attorney General when the office is vacant or the holder is unable for any reason to exercise the functions of that office. We so **recommend**. It is also our **recommendation** that the

office holder be a suitably qualified Belonger in the first instance. We do not consider that the Constitution can properly provide for the automatic succession by the Solicitor General (or Deputy Attorney General) to the office of Attorney General. In our view, it would not be proper or prudent to provide for such a limitation on the constitutional authority to appoint the Attorney General.

Qualifications for Office of AG and Deputy AG

3.30 As regards qualifications for the office of Attorney General, the holder should be a person qualified to be admitted in the Virgin Islands as a Barrister-at-law (or Attorney-at-law) and have a minimum of ten years practice as a Barrister; this being the minimum qualification for appointment as a judge of the High Court. The same qualifications would apply to the Solicitor General, but with a minimum of seven years practice as a Barrister being required. We so **recommend.**

Judicial and Legal Service Commission

3.31 As presently constituted, the Judicial and Legal Service Commission comprises the Chief Justice, another judge of the Court of Appeal or the High Court and the Chairman of the Public Service Commission. In practice, one of the resident High Court judges sits as a member, since there is no Court of Appeal judge ordinarily resident in the Territory. Members of the Legislative Council have recommended expanding the membership to include two suitably qualified persons from the Virgin Islands. This recommendation is based, at least in part, on their view of a somewhat expanded role for the Judicial and Legal Service Commission. The Commission is of the view that an increase in the membership of the Judicial and Legal Service Commission is justified only where the Judicial and Legal Service Commission is granted executive authority, similar to what we have recommended for the Public Service Commission, or Cabinet is constitutionally obliged to follow its recommendations for appointment of legal officers.

CHAPTER 4

Belonger Status

ISSUE NO. 2 – *The provision of a clear definition of "a Belonger", in particular persons who may be deemed to belong to the British Virgin Islands, but who may not enjoy BOTC status under the British Nationality Act 1981, with the entitlement to a passport that such status offers.*

An Overview

4.1 This is also an Issue of considerable vintage, having been the subject of a constitutional review in 1993 and the report of two local committees, one in 1977 and the other in 1997, both under the chairmanship of Gerard St.C Farara Q.C., the Chairman of this Commission. The Constitutional review conducted in 1993, considered Nationality and Belonger status and confirmed that a large number of persons had expressed concern, both orally and in writing, about the application of certain provisions of the British Nationality Act ("BNA") to status and rights in the Virgin Islands. They felt it restricted privileges they previously enjoyed under local legislation, for example, the Immigration and Passport Act. Others expressed concern regarding what was perceived as the "discriminatory effects" of the provisions of section 2(2) of the Constitution relating to Belonger status.

4.2 The 1993 Commission, having considered the submissions made regarding immigration status, concluded: "*it appears to us that there are areas in which there is conflict between the provisions of the British Nationality Act, the Constitution and the Immigration and Passport Act which need to be reconciled.* The report recommended an examination of the legal technicalities by a local committee whose findings should be agreed by the British Government and given effect in the Constitution.

4.3 This gave rise in 1997 to the appointment by Executive Council of a seven member committee - The Committee to Redefine Belonger Status. - charged with examining and recommending changes to the categories of Belonger status in section 2(2) of the Constitution and in the Immigration and Passport Act.

4.4 The Committee's Report was submitted to Executive Council on 30th September 1997. It contained some 26 recommendations which were in the main accepted by

both the Executive and Legislative Councils, and also by the British Government. This resulted in a complete revamping and restating of section 2(2) of the Constitution and so as to avoid possibly conflicting provisions, the deletion of the deeming provisions from the Immigration and Passport Act. These revisions, and others recommended in the 1993 report, were brought into effect by virtue of the Virgin Islands Constitution (Amendment) Order 2000 (No. 1343).

4.5 At the various public consultations held throughout the Territory, the Commission took the view that it would not limit feedback from residents to only the seven specific Issues in the Terms of Reference, but would invite views and recommendations on any matter affecting the Constitution. With regard to Issue No. 2, this took the form of soliciting feedback on ways to improve the process associated with the acquisition of Belonger and Residence status, once an eligible person had applied for such status.

4.6 Throughout the various communities, the Commission recorded public concern relating to the procedure of applying for and processing applications for Belonger and Residence status. Many persons were quite concerned as to its arbitrary and seemingly subjective nature, its inefficiency and non-transparency. Questions were raised as to the adverse implications of such a process for 'good governance'. It was also generally felt, that there should be a clear and well publicized official policy addressing the requirements for eligibility and acquisition of both Belongers and Residence status.

4.7 Indeed, there appeared to still be much confusion in the minds of some persons regarding Belonger status, Residence status and British Citizenship. Many persons who attended the various meetings were apparently unaware of the implications on matters such as status, nationality and the entitlement to a passport, which go with the Virgin Islands being a British Overseas Territory (BOT). Many still confuse 'Belonger status' or being deemed to belong to the Virgin Islands, with the entitlement to a British passport or equate Belonger status with 'citizenship'.

4.8 Under local law, persons deemed to belong to the Virgin Islands, some of whom may not be BOTCs, enjoy some of the rights normally reserved in an independent country for its citizens. These include the right to-

- hold elected office in the Legislature;
- vote at General Elections;
- acquire land in the Virgin Islands without having to obtain a land-holding license;
- remain in the Territory without being subject to immigration restriction as to the period of stay; and
- work without the requirement of a work permit;

4.9 Residents who satisfy certain criteria in the BNA are eligible for consideration to become BOTCs by naturalization and, consequently, Belongers. Others who are BOTCs by birth or descent are now entitled to full British Citizenship. In each case, the person is entitled to a British passport commensurate with such citizenship status. However, not all Belongers are eligible to become British Citizens.

4.10 The present Government has recently announced to the public, a new policy governing the acquisition of Residence and Belonger status. A copy of the Policy is **Appendix 4**. In essence, it establishes a 20 year residence requirement for anyone seeking Residence status. Such a person would have to be resident for at least another 5 years before becoming eligible for Belonger status. The Policy places more emphasis on the grant of Residence status to long term residents of the Territory who have applied by a certain date and are otherwise qualified, and severely limits the grant of Belonger status going forward. Those persons who have applied for Residence status prior to 1st January 2003 and have 20 years continuous residence in the Territory, will be recommended by the Immigration Board for the grant of such status. Of those who apply after said date, only 25 such applications per year will be granted. As regards Belonger status, no more than 25 per year from among those with Residence status, will be made Belongers.

4.11 The Virgin Islands Constitution (Amendment) Order 2000 (No. 1343) Section 2(2) (a) to (g) sets out the categories of persons deemed to belong to the Virgin Islands. These include Belonger status by birth, naturalization, descent, adoption or grant and, to some extent, by marriage. It deems persons to belong by virtue of whether they were born in or outside the Virgin Islands. These provisions create no fewer than eight main categories by which a person can be deemed to Belong, and hence, be imbued with the rights attendant to such status. This multiplicity of categories has been cause for concern by some persons who attended the public meetings or

participated by other means in the public consultations. One lady, a resident of Anegada, recommended very pointedly that the categories be limited to one or two - birth or descent.

4.12 This view seems to be shared by Members of the Legislative Council in their Position Paper. They preface their submissions on this Issue, by citing the somewhat disconcerting statistics that Belongers constitute only forty-five percent of the Territory's population and a mere thirty-six percent of its workforce. These statistics led Honourable Members to remark that Belongers were "*approaching extinction*" which they attributed to *"the stringent criteria governing who may become a Belonger."* It may be felt that the recent Policy statement further limits the ability to acquire Belonger status by grant.

4.13 Members of the Legislative Council are of the view that there are some "inequities" as to rights and privileges which need to be addressed, and point, as an example, to the child born outside the Virgin Islands to belonger parent(s) not being deemed to belong, but a child born outside the Territory to non-belonger parents who is adopted by a Belonger, is deemed to belong. This statement is partially correct (as it relates to the child born outside the Virgin Islands to a Belonger), as it applies to the second generation by descent, the first generation child being deemed to belong under category (d) of section 2(2).The Commission recognizes this as one of the matters which need "fixing" and will make the necessary recommendations to ensure that the second generation child born outside the Virgin Islands, whose grandparent was born in the Territory, will be deemed to belong.

4.14 Members of the Legislative Council go on to consider "augmenting" the Belonger population in ways that protect the quality of life enjoyed in the Territory, a view expressed to the Commission by quite a number of Virgin Islanders. They conclude that-

> *"this can best be achieved by defining a Belonger as to birth and descent and then encouraging national pride, among other things."*

4.15 Members of the Legislative Council also go on to make six substantive recommendations for consideration by the Commission. These are-

(i) *the definition of a British subject should be more specifically defined to include children of BVIslanders born outside the Territory up to and including the second generation;*

(ii) *decisions with regard to naturalization under the British Nationality Act should be made by Executive Council;*

(iii) *persons born outside the BVI to a parent or parents who are BVIslanders should be deemed Belongers;*

(iv) *persons born in the BVI, who meet the ten-year residency qualification, of non-Belonger parents shall be deemed Belongers;*

Please note that there is a minority view that persons born in the BVI should be deemed to belong.

(v) *the children and grandchildren of persons deemed to belong to the Virgin Islands under the provisions of TOR 2 (iii) should be deemed Belongers;*

(vi) *serious consideration should be given to the issuing of passports to persons born in the BVI who are not BOTCs for the following reasons:*

(a) *children have no control over where they are born;*

(b) *the inconvenience, difficulty and expense of securing a passport from the parents' place of birth for a child who was not born in that country are overly burdensome, unfair and seem unjustified;*

(c) *condition (b) fosters animosity between the child and parent against the BVI, thus defeating the Territory's very attempt to encourage the national pride which is so critical to nation-building and stability.*

The British Nationality Act 1981

4.16 Before scrutinizing certain of the categories of persons deemed to belong by virtue of section 2(2) of the Constitution, it is useful to list the ways in which persons born either within or outside the Virgin Islands to parents who were born in the Territory and are BOTCs, can become BOTC themselves (and hence Belongers) entitled to a British passport that such status confers. These are three of several provisions in the British Nationality Act (BNA) that militate against a person being rendered "stateless".

4.17 By section 15(4) of the BNA, a child born in the Virgin Islands who resides here continuously for the first ten years of his or her life is 'entitled' to be registered as a BOTC. There is no time limit on the making of such an application once the initial period of residence has been established. Persons falling in this category, may register as a BOTC even where they became aware of their entitlement many years later. This provision would apply to persons who were born in the Territory to parents who are not BOTCs or "settled" in the Virgin Islands, but whose child went to school and grew up in the Virgin Islands. Such a child would, after 10 years continuous residence, be able to obtain both a passport and Belonger status, with all the rights and privileges thereto appertaining.

4.18 Similarly, by section 17(2) of the BNA, a child born outside the Virgin Islands to a parent who is a BOTC, can be registered as a BOTC within the first year of birth and, hence, becomes a Belonger entitled to a British passport commensurate with that status. Furthermore, a person residing in the Territory for at least five years continuously, can apply for and may become a BOTC by naturalization entitled to such passport, and hence a belonger (Section 18 of the BNA). In any event, the BNA gives a discretion to the Secretary of State, in special circumstances, to grant naturalization to anyone residing in the Territory.

4.19 It is the Commission's view that these existing provisions are adequate to address the concerns expressed by Members of the Legislative Council regarding issuing British passports to persons born in the Territory who are not then BOTCs. In most instances, the child is not rendered stateless, but takes on the nationality of either parent or both with the entitlement to a passport of such country.

The categories of Persons Deemed to Belong

Born in the Virgin Islands of a Parent who is "Settled" in the Virgin Islands

4.20 This category came up in the public consultations for some scrutiny and clarification. It is intended to make Belongers, persons who were born in the Territory when one of their parents were "settled" in the Virgin Islands, although not a BOTC. Again, this category addresses the concerns expressed to the Commission by many, that persons

born in the Territory who have "grown up" here, should 'belong' thereto. On the other hand, it excludes persons whose parents, and hence themselves, were of a more transient nature and do not know these islands as "home". The term "settled" is defined to mean – *"ordinarily resident in the Virgin Islands without being subject under any law in force in the Virgin Islands to any restriction on the period for which he may remain."* (Section 2 (2)(a)(ii))

4.21 Many members of the community expressed concern that this definition was being used to apply to government contract officers, so as to make their children born in the Territory, Belongers at birth. This certainly was not the intention or purpose of the recommendations which led to this provision being inserted in the Constitution. There was never any intention to accord such privilege to the offspring of government contract officers (or employees of statutory or Crown corporations for that matter), born in the Territory, who by virtue of their employment with Government, do not require a work permit. Accordingly, it is the **recommendation** of the Commission that the definition of "settled" be clarified and redefined so as to specifically exclude contract officers of the Government and its statutory and Crown corporations. This can be achieved by the addition at the end of the definition of the term "settled" the words: *"but does not include persons on contract with the Government of the Virgin Islands or any of its statutory bodies or Crown corporations."*

Belonger Status by Adoption

4.22 Section 2(2)(c) states that a person is deemed to belong to the Virgin Islands if that person –

> *is a child adopted in the Virgin Islands by a person who is deemed to belong to the Virgin Islands by birth or descent.*

4.23 The Commission recorded many views from the public to the effect that this category creates an anomaly which is not "fair" to children born in the Territory who, because of parentage or other factors, are neither BOTCs nor Belongers. The argument is to the effect that a child born outside the Territory can, by the fact of adoption in the Territory by a parent who is a Belonger by birth or descent, become a Belonger themselves with all attendant rights; whereas a child born in the Territory may not

belong at birth. In fact, a child who acquires Belonger status by adoption retains that status even if the adoption order ceases to have effect.[16] The exception to this is in the event the adoption order is revoked by a court, due to fraud or some other cogent ground. In such a case, the order ceases to have effect and hence the child ceases to be a Belonger.

4.24 Indeed, there were very strong views put forward by some members of the public that any person born in the Virgin Islands should, automatically, be deemed to belong, regardless of the status of their parents. The expression from this segment of the public was '*where you are born you must belong*'. However, this is very much a minority view, and one with which the Commission is not in agreement.

4.25 The majority of Members of the Legislative Council have taken the position that "*persons born in the BVI, who meet the ten-year residency qualification, of non-belonger parents shall be deemed Belongers.*" This position was not arrived at with unanimity, as they also record a minority view "*that persons born in the BVI should be deemed to belong.*" The fact is that, by virtue of the concomitant application of section 15(4) of the BNA and category (e) of the Constitution, persons who were born in the Territory to parents who are not BOTCs and have resided here continuously for the first ten years of their lives (without being absent for more than 90 days), are entitled to be registered as a BOTC with the entitlement to a passport, and, consequently, deemed to belong to the Virgin Islands. It may be that many persons were not aware of this provision and have to date failed to avail themselves or their children of it.

4.26 Having given careful consideration to this perceived 'anomaly', the Commission is of the view that the matter of children born in the Territory but who are not Belongers at birth, is adequately addressed under current law, namely, the British Nationality Act whereby after 10 years of demonstrated continuous residence in the Territory - enough time to have enjoyed the benefit of primary education and to have begun to develop some affinity and connection with the Territory, its culture and values - such persons become for life (unless the provision is repealed by the UK), entitled to registration as a BOTC and, consequently, to a British passport and Belonger status. If consideration is being given at any time by the UK to repealing this provision in the

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[16] B.N.A 1981 part1, section 1(6)

BNA, then consideration can be given at that time by the local government to having the Constitution amended so as to entitle such persons to Belonger status upon application.

4.27 As regards the adoption in the Territory by parents who are Belongers by birth or descent, of children born outside the Territory, the Commission considers that this category ought to be retained as is, and we so **recommend**. Adoption is usually regarded in law as a special status, as the effect of an adoption order is to terminate the parental rights of the natural parents and to vest such rights in the adopted parents, usually for life.

Belonger by Descent - Second Generation born outside the Virgin Islands

4.28 Section 2(2)(d) states - "*a person is deemed to belong to the Virgin Islands if that person is born outside the Virgin Islands of a father or mother who is a British Dependent Territories Citizen by virtue of birth in the Virgin Islands.*"

4.29 The effect of this provision is to confer Belonger status on the first generation born outside the Virgin Islands to a parent who is a BOTC by virtue of birth in the Virgin Islands. The Commission recorded the concern of a large number of persons that this category of Belongers does not extend to at least the second generation born outside the Virgin Islands. This is an issue which was also addressed by the Members of the Legislative Council both at the Commission's meeting with them, and in their Position Paper.

4.30 The magnitude of the problem is realized when we consider that a significant number of Belongers have, for historical and other reasons, given birth to children outside the Virgin Islands and these children have in turn given birth to children outside the Territory, usually in either the US Virgin Islands or the continental United States. Further, many Virgin Islanders whose children were born outside the Territory, have failed to register them as BOTCs within the prescribed time or to apply for registration while the child is still a minor. (The term "minor" is defined in section 50(1) of the BNA as "a person who has not attained the age of 18 years.) However, these second generation children, by virtue of lack of registration by their parents cannot obtain BOTC, and hence Belonger status. Section 2(2)(d) provides for Belonger status for children of BOTCs solely by virtue of the parent's birth in the

Virgin Islands, and does not extend to the second generation born outside the Virgin Islands.

4.31 Members of the Legislative Council in their Position Paper at subparagraph (iii) expressed the view that: *"persons born outside the BVI to a parent or parents who are BVIslanders should be deemed Belongers"*. If the term "BVIslanders" is synonymous with persons deemed to belong to the Virgin Islands, then this provision currently exists in the Constitution under section 2(2)(d).

4.32 The Members of the Legislative Council also state: *"the children and grandchildren of persons deemed to belong to the Virgin Islands under the provisions of TOR 2(iii) should be deemed Belongers."* The interpretation here is that "second" and "third" generation Virgin Islanders born outside the Territory should be deemed to be Belongers. The Commission supports the position that second generation Virgin Islanders born outside the Territory whose grandparent was born in the Territory, should be deemed to belong, and we so **recommend**. Accordingly, category (d) in the Constitution ought to be amended by adding at the end the words: *"or descent"*.

4.33 The Commission considers that "descent" ought not to extend to the third generation born outside the Virgin Islands. This view accords with the majority view expressed at our public consultations. However, matters of the inheritance of land are relevant and must be protected through some legislative mechanism. Accordingly, we **recommend** that such persons ought, as a matter of government policy expressed in the relevant legislation, to be exempt, upon application, from the requirement of obtaining a land-holding licence to own property in the Virgin Islands. Likewise, provision ought to be made for such persons to be made Belongers upon residing in the Territory continuously for a minimum period of 3 years. We so **recommend**.

Decisions on Naturalization

4.34 The Members of the Legislative Council also took the position that *"decisions with regard to naturalization under the British Nationality Act should be made by Executive Council."* Naturalization under the BNA is an avenue to Belonger status, one which is well used, as the statistics in Appendix 7 indicate. It is an avenue which is governed not by local law, but imperial legislation relating to the grant of

'citizenship', namely, the BNA. As such, our elected representatives have no 'control' over this avenue to the local 'Belonger' status. Any change in the law to expressly provide for the approval of Executive Council (or Cabinet) would necessitate a change in the BNA, a matter over which we have no control.

4.35 It is the Commission's understanding that in practice most, if not all applications for naturalization, are presented by the Governor to Executive Council for its approval, although not strictly required, and this is for the very reason that naturalization as a BOTC also does confer Belonger status. We applaud this practice and **recommend** its continuance as a convention. The Commission also **recommends** that in due course consideration be given by the UK Government to giving legislative effect to this convention.

Preservation of Numerical Pre-dominance, Heritage and Culture of indigenous People

4.36 The Commission also noted the concern amongst many Virgin Islanders that the continued unmonitored influx of persons from abroad could lead to further outnumbering and subsequent diluting of the "native" population, to the detriment of the local heritage and culture. The latest statistics available show that approximately 42 percent of residents living in the Virgin Islands were born in the Virgin Islands.[17] This statistical trend, is certainly cause for concern. The Government has sought to address this in part by the new Policy regarding the grant of Residence and Belonger status (Appendix 4). It is anticipated that other pronouncements of policy regarding immigration and labour issues will be forthcoming from Government, which may go some way towards retarding, if not arresting, this trend. As such, the Commission is content to rely on its recommendations under this Issue and Issue No. 3. (Chapter 5)

Summary of Recommended Amendments to section 2(2)

4.37 The Commission makes the following recommendations as changes to the categories of persons deemed to belong at section 2(2) of the Constitution –

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[17] Source: Development Planning Unit of the Government of the BVI

Section 2(2)(a)(ii) be changed to the following: *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 may remain but not to include public officers on contract with the Government of the Virgin Islands or any of its statutory bodies or Crown corporations.*

There be no change to Section 2(2)(b).

There be no change to Section 2(2)(c)

Section 2(2)(d) be amended to read as follows*: 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 by descent;*

There be no change to Section 2(2)(f)

There be no change to Section 2(2)(g)

CHAPTER 5

"Indigenous People"

ISSUE NO. 3 - The protection of the rights and privileges of the indigenous people of the British Virgin Islands, by limiting the ability of non-indigenous persons to hold elected office.

5.1 The special protection of certain rights and privileges of indigenous peoples in various areas of the world is a historically well-established principle. In fact, the United Nations, in order to promote and mandate the rights and privileges of indigenous peoples defined the term for appropriate categorization as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

5.2 This definition came under attack as being not sufficiently inclusive. It was argued that groups, by their very isolation may not have been impacted by a "different culture or ethnic origin from other parts of the world", but who in a post colonial setting may have become known or could have been included into the boundaries of new states on the assumption of independence.

5.3 What the subject literature suggests is that the term *indigenous people*, has led into a definitional quagmire, once one steps outside the obvious rational perspective, to a position that, "I may not be able to define it, but I know it when I see it". It was precisely such a self-defining approach that "indigenous peoples know who they are"; which was advanced by delegates representing *indigenous peoples* in United Nations forums. As the term: *indigenous people* subsumed certain agreed international rights and privileges, the legitimatisation of "self-definition" would have led to international chaos in so far as special rights and privileges of such a status were concerned. As a result, a more rigorous

effort at some additional definitional accommodations towards inclusiveness was acknowledged, which led to an updated definition, stated thus -

Indigenous Populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement, or other means, reduced them to a non-dominant or colonial situation; who today live more in conformity with their particular social economic and cultural customs and traditions rather than the institutions of the country of which they now form a part, under a state structure that incorporates mainly the national, social and cultural characteristics of other segments of the population that are predominant.

Although they have not suffered conquest or colonization, isolated or marginal groups existing in the country should be regarded as covered by the notion of "Indigenous Populations" for the following reasons:

a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;

b) precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as Indigenous;

c) they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.[18]

5.4 In considering the above Term of Reference, the Commission had to determine whether a homogenous group of people exists in the Virgin Islands, who could be classified as *indigenous*, to the satisfaction of international criteria and not merely local parlance.

5.5 In the Commission's view, neither the former nor the latter definition appeared to be sufficiently elastic to enable such a classification of a specific group of people in the Virgin Islands. Virgin Islanders did and continue to experience a colonial political

[18] U.N., UNESCO, ref: E/Cn.4./Sub.2/L.566, 1982

environment, but the existing situation grew from the roots of capture, forced relocation and enslavement, rather than existing territorial conquest.

5.6 Faced with the terminological dilemma arising out of this "Term of Reference", the Commission was of the view that it needed to look at the intent (what was the objective being sought by this Term of Reference as an end result). In this respect, the Commission was greatly assisted by the public meetings held throughout the Territory, as well as one in St. Thomas and, in particular, at a meeting with the elected membership of the Legislature.

5.7 Many suggestions were put forward at the public meetings as to how the Commission could determine who were "indigenous Virgin Islanders"

5.8 At the meeting in St. Thomas, one person proposed that to be classified as an "indigenous Virgin Islander" a person has to be able to demonstrate roots back to the abolition of slavery in 1834. Within the Virgin Islands, a number of persons at meetings suggested the precise year from which time a person had to be able to prove descent from a person resident in the Virgin Islands at the chosen time. The re-establishment of the Legislature in 1950 was one such point; another was the 1967 Constitution, which introduced the ministerial system. In a written submission, one member of the Legislature telescoped three generations backward from 1960 to 1901 as the anchor–year from which lineage had to be established. In the later instance, it was held that 1960 was the development take-off year for the Territory. The majority of those attending the public meetings, took the approach, that all persons at the time of the adoption of the new constitution resulting from the current review, who could prove descent from a person born in the Virgin Islands over a period of at least three generations, should be classified as an "indigenous Virgin Islander". Following therefrom, the descendants of such persons would also be so considered.

5.9 Elected members of the Legislature appeared not to be unduly concerned about determining who was an "indigenous Virgin Islander". Some members held the view, that "where you are born, is where you are from". Others felt that "place of birth" was not necessarily sufficient to determine rights of citizenship or "Belonger Status". All members of the Legislature were in unanimity that, if the Virgin Islander character and cultural modalities were to be preserved in that institution, then, neither British Overseas Territories Citizenship (BOTC) nor the status of Belonger was sufficient to enable one to

stand for a seat in the Legislature of the Virgin Islands.

5.10 Together with a substantial number of citizens who attended the public meetings, current Legislative Members were not particularly concerned about identifying a special category of Virgin Islanders to be accorded special rights and privileges. It appeared to be their view, that the latter, could be subsumed from the category of persons who would qualify to stand for a seat in the Legislature. The thinking seemed to be that if the unique cultural attributes of the community could be embodied in the Legislature, then flowing therefrom, would be the appropriate empowerment necessary to secure, foster and nourish that which was distinctly a cultural *Virgin-Islandness.*

5.11 The Commissioners in their own deliberations had been gradually coming to a similar view. An attempt, in the opinion of the Commissioners, by those in the predominant political position, to classify themselves as *indigenous people,* as a means of securing their dominant political position into the future, could well boomerang in unpredictable outcomes. In fact, the potential negative impact in terms of divisiveness within the community, by such a classification, was a cause for concern among many who attended the public meetings, as well as some current members of the Legislature.

5.12 The ideas advanced in the course of the Commission's public consultation did not, in our view, provide a commanding definition of "indigenous Virgin Islanders" to be sufficiently efficacious in its intent, without being extremely prejudicial and uncertain in its application. It was held that, the objective embedded in such a definition could be better achieved by the more practical and tried approach of establishing the eligibility of persons to hold a seat in the Legislature. As a result, the search for a definition of the "indigenous Virgin Islander" does not seem necessary or essential to the Report.

5.13 The intention of this particular Term of Reference was made abundantly clear at our meeting with current elected members of the Legislature, when it was boldly stated by one member, that the *"objective of this exercise is to prevent the overrun of the Territory's elected offices by foreigners"*. The situation in the United States Virgin Islands Legislature was referred to as an example. While these concerns may be dismissed by some as the normal xenophobia of small societies, the socio-cultural dislocation of homogenous communities, by the impact of mass immigration to support rapid economic growth is well documented. Possibly in no single island economy has this been put to a greater test than in the case of the *Fiji Islands.*

5.14 The *Fiji Islands* in the South Pacific are an island chain as is the Virgin Islands, except for the fact that they are substantially larger and farther apart. The native Fijian was the primary ethnic race, with the Rotumans as the minority. To satisfy the needs of an agricultural based economy, a large number of East Indians workers were brought to the island chain. The sustained East Indian immigrant inflow together with other immigrants, led eventually in April of 1987 to a new era for Fijian politics, with the coming to power, of a coalition government that removed the traditional ethnic Fijian from control of the government. Within thirty two (32) days, *a coup* removed the multi-racial coalition from power.

5.15 This issued in a period of unstable government for a time until it became possible to agree on a constitutional framework that recognized the paramountcy of the ethnic Fijian. The new constitution specifically states: *to the extent that the interest of different communities are seen to conflict in... negotiations, the paramountcy of Fijian interest as a protective principle continues to apply, so as to ensure that the interest of the Fijian community are not subordinated to the interest of other communities.*

5.16 The "Compact" as this section of the Fijian Constitution is referred to, provides for: *affirmative action and social justice programs to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people...."*

5.17 The Constitution makes provision for seats in the Parliament, to be ethnically based to ensure the viability of its principles. It is fair to conclude, that special constitutional arrangements to ensure the political, social, cultural and ultimately economic health of a society are both prudent and internationally acceptable. Will Durant, in *Lessons from History*[19], has stressed the importance of creating a balance between order and freedom. He notes "freedom is the child of order and the mother of chaos". There are elements in cultural normative structures, that can become hurdles on the path to modernity, but the cultural heritage is also the glue that ensures a sense of community, which is the core of one's sense of self. It is essential in the present to investigate and address those areas on the socio-political landscape from which smoke seems to be rising, if future conflagrations are to be avoided. Those who define themselves as Virgin Islanders, because they have a communal cultural identity with this Territory are indicating a sense

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[19] Durant, Will. *Lessons from History...*

of foreboding about the future and their role therein. This is the well from which springs the thought that action must be taken now to avoid future political and economic dislocation. The Fijian approach since the revolutionary period was to establish paramountcy through ethnicity. In the case of the Virgin Islands, ethnicity is not an obvious line along which divisions can be made. This became abundantly clear in attempts to define a Virgin Islander along indigenous lines. At the end of the day, the intent of the Fijian approach was to shape the profile of the Parliament. Although there are those in our Territory who are of the view, that there are "belongers" and *"belongers"*, it does seem less divisive to address the issue through eligibility to hold a seat in the Legislature, rather than by way of some pseudo definition.

5.18 The use of eligibility to shape the profile of the Legislature is not new to the Virgin Islands. Our 1976 Constitution barred ministers of religion, from holding a seat in the Legislature on the grounds that the "pulpit" provided them with an unfair advantage. A hard battle was also fought to exclude "medical doctors" as well, on the belief that voters could be manipulated out of their anxiety at having their political persuasion interfere with treatment of their physical health.

5.19 Qualifications for elected membership to the Legislature of the Virgin Islands are stated in Section 28 and Disqualification for elected membership are stated in Section 29 (as amended in 2000). Section 28 states "*...a person shall be qualified to be elected as a member of the Legislative Council, if, and shall not be qualified to be so elected unless, he –*

(a) is a British subject of the age of twenty-one years or upwards, and
(b) is deemed to belong to the Virgin Islands, and
(c) is otherwise qualified as a voter under Section 31 of this Order" (The Virgin Islands (Constitution) Order, 1976.)"

5.20 The amended Section 29 removed the disqualification pertinent to ministers of religion, but retained one disqualification, which a number of Virgin Islanders hold to be inequitable.

Sub-section (1) states:
"*No person shall be qualified to be elected as a member of the Legislative Council who-*

(a) *is by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state."*

5.21 The Commission is of the view, that whatever is deemed appropriate to secure, within the membership of the Legislature, a positive disposition towards fostering and nourishing that which is effectively culturally *Virgin Islandness*, could best be achieved by acceptable language written into such sections of the Constitution. However, in doing so, the Commission is mindful of the undesirability of constitutionally taking away rights that a Belonger or citizen presently enjoys. (For purposes of the record, however, it should be noted that this is exactly what the British Parliament did to prevent some former *Citizens of the United Kingdom and Colonies* from enjoying the *right of abode* in the UK).

5.22 Section 36 of the Constitution of Anguilla provides the type of language that would be appropriate in format. The Section begins by stating "*...a person shall be qualified to be elected as a member of the Assembly if, and shall not be qualified to be so elected unless, he is a person who belongs to Anguilla of twenty-one years or upwards who is registered as a voter in an electoral district in Anguilla and either – (a) was born in Anguilla and is domiciled there at the date of his nomination for election; or (b) has resided in Anguilla for a period of not less than three years immediately before the date of his nomination for election and is domiciled there at that date and is the son or daughter of parents at least one of whom was born in Anguilla.*"

5.23 In developing the qualification and disqualification profiles of membership in the Legislature, the first obvious casualty would justifiably be the *British Subject* requirement. This term is now considered obsolete although it exists in our current Constitution. More recently, it has in some instances, been replaced by the term *Commonwealth citizen,* especially, with reference to a person who would otherwise be stateless. Such a person is entitled to a passport issued by the "British" government. There seems little justification for retaining such a qualification in our Constitution. It seems appropriate to remove this qualification as was done in the Anguilla Constitution and the Commission so **recommends.**

5.24 A person born within a British Overseas Territory would automatically be a belonger: given descent, *settled* parentage or after the appropriate period, by registration. If a person is born outside a territory, Belongership can only be obtained, by descent,

certification, naturalization, or adoption.

5.25 To use a traditional Virgin Islands phrase, what profiling the Legislature under the circumstances "boils down to" is categorizing membership qualifications along lines of how *Belongership* was obtained and current familiarity of the individual with the Virgin Islands' situation. Those who claim, "where you born is where you from" are just as adamant that "where you from is not necessarily, where you can sit". Even if it is held as a principle, that all Belongers are equal, the Commission has been left with the distinct impression, that there is a strong conviction by a majority of Belongers that some are more equal than others. Those who are Belongers by virtue of descent, even if not born in the Virgin Islands, seem to consider themselves top Virgin Islanders. This was clearly the thinking at all the public meetings held by the Commission. Being born in the Virgin Islands, was considered the qualifying factor for inclusion in the second level rung of Belongership.

5.26 In the thinking of participants at the public hearings, *descent* and *birth* seemed to offer the more likely opportunity for an individual to experience a socio-cultural milieu that was distinctly Virgin Islands.

5.27 *Birth* and *descent* are historically fundamental to the core concept on which citizenship is based. Any attempt to shape the membership structure of the Legislature, would find it difficult to secure better pegs on which to hang profiling garments. It must also be stated, that the evidence before the Commission, suggests there are those in the community and indeed in the current Legislature, who would prefer to restrict qualification to sit as a member of the Legislature to Belongership arising purely from descent. However, the Commission does not consider the latter to represent the broader consensus and is of the view that *descent* and *birth* should be the foundation pillars of membership in the Legislature and so **recommends**.

5.28 Nonetheless, even though *descent* or *birth* will be essential, neither is sufficient for qualification to hold a seat in the Legislature. In the case of Belongership arising out of descent, it has been held that such persons, especially born abroad, may not be knowledgeable about the Virgin Islands. Even if born in the Territory, an individual may have left at a very young age and not returned for any sustained period of time. Views expressed to the Commission at public meetings as well as the thinking of the current Legislature suggest the need for prescription in the case of Belongers by descent born

abroad. The Commission finds that the body of opinions favours the limiting of the qualification to second generation Belongers by descent born outside the Virgin Islands and so **recommends**.

5.29 It is a tradition of the Virgin Islands, that even in instances where one has rights, nonetheless, one should "know one's place". There is consensus on the position, that even if one would otherwise qualify to hold a seat in the Legislature, no one should be eligible to jump into the field of candidates, unless that individual knows the community and is known thereby. The suggested qualifying period of resettlement varies, but the Commission in its consideration **recommends** as follows.

(a) If a person has never been domiciled in the Virgin Islands, the period should be the legal possible term of the Legislative Council, plus one year.

(b) If a person, previously domiciled in the Virgin Islands, has lived outside of the Virgin Islands for a sustained period greater than ten years (excluding periods related to medical or educational purposes) such a person must have re-established residency in the Virgin Islands for a period of not less than three years.

5.30 One of the disqualifications relative to holding a seat in the Legislature, is that cited earlier under Section 29 (1):

"No person shall be qualified to be elected as a member of the Legislative Council who-

(a) is by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state."

5.31 It is the view of a large number of Belongers, both in the Virgin Islands and the Virgin Islands of the United States, that this disqualification is most unfair, especially so as persons who are Belongers, but were born outside the Virgin Islands and are citizens of another national state are not so disqualified. This matter is further dealt with at paragraphs 10.48 to 10.51.

Summary of Recommendations

5.32 *1) The Commission does not consider it essential to define or categorize Virgin Islanders as "an indigenous people" as a means of protecting their rights and privileges, in*

particular, the right to hold elected office in the Legislative Council.

2) The Commission shares the broad view that the rights and privileges of Virgin Islanders can best be protected through the constitutional legislative process of the Territory.

*3) The Commission agrees with the sentiments generally expressed by the public as well as current membership of the Legislative Council, that those who are qualified to hold seats in the Legislature must reflect a common heritage as a people and that historically this has best been effected through a common lineage and place of birth and as a result recommends that **birth** and **descent** underlie the basic qualifications for holding a seat in the Legislature.*

4) The Commission recommends:

a) that the term "British Subject" be removed as a qualification to hold a seat in the Legislature, and replaced by the term "Virgin Islander" who is a person deemed to belong by birth or descent, being -

(i) born in the Virgin Islands of a father or mother who is a British Overseas Territories Citizen by birth or descent;

(ii) born in the Virgin Islands of a father or mother who is deemed to belong to the Virgin Islands by birth or descent;

(iii) born outside the Virgin Islands of a father or mother who is deemed to belong to the Virgin Islands by birth or descent; provided that persons born outside the Virgin Islands who are deemed to belong by descent will not be so qualified beyond the second generation;

b) that a person born in or outside the Territory and who would otherwise qualify to hold a seat in the Legislature would not be so qualified unless a period of residency has been fulfilled as follows:

(i) if that person has never been domiciled in the Virgin Islands, the period of residency should be the legal possible term of the Legislative Council, plus one year;

(ii) if a person formerly domiciled in the Virgin Islands has lived outside the Virgin Islands for a continuous period greater than ten years (excluding periods related to medical or educational purposes) such a person must have re-established residency in the

Virgin Islands for a period of not less than three years immediately before the date of his nomination for election and is domiciled in the Virgin Islands at that date.

5) It is the Commission's view and recommendation that all persons who at the time of the coming into being of these recommendations would otherwise have had the right to hold a seat in the Legislature should continue to enjoy such a right and should not be disqualified from so doing.

CHAPTER 6

Sixth Ministerial Position

ISSUE NO. 4 - The introduction of a sixth ministerial position in light of the increase in the size of the Government and the need to ensure greater efficiency and productivity.

6.1 The evolution of ministerial authority arose from the days when monarchs selected ministers, later to a point where they refused to accept certain nominees for the position to the present day where in fact the appointment of Ministers by the Monarch is a mere formality. The Ministerial system in place in the Virgin Islands is based on a miniaturized version of the Parliamentary System in the United Kingdom but with a unicameral Legislative Assembly as opposed to two in the United Kingdom, and most former British Colonies. Consequently, all Ministers are drawn from the elected members of the Legislative Council as provided by the Constitution.

6.2 The present system therefore limits the choices of persons who can be selected as Ministers based on their specialized training in certain areas, for example, the Attorney General, a post which in the United Kingdom often falls to a member of the House of Lords, albeit that many of the members of this House are former members of the elected House of Commons who no longer wish to stand at elections and are, therefore, nominated as life peers by the Prime Minister after each election.

6.3 The practice under our Constitution permits the person who is the leader of the Majority Party (or the person judged most able to command the majority in the Legislative Council) to be appointed as Chief Minister. That person then "advises" the Governor as to who should be appointed as Ministers bearing in mind their presumed capacity to manage the portfolios given to them and the obvious requirements of being able to hold the members of his party together.

6.4 There exists the notion that a majority of one seat casts doubt on the ability of the Chief Minister to discipline members and leaves a distinct feeling among members of the public that the public interest is being held hostage by one person. In the United Kingdom where there are 659 members of the House of Commons and perhaps only 30 cabinet positions, it is very clear (and has occurred there as well as others with similar systems) that the backbenchers of either party can in fact have the Government removed from

office by a vote of no-confidence. The simple equation is that there should be a multiple factor of non ministers to ministers.

6.5 A modification to this principle is in Bermuda where it is written into the Constitution that only 12 of the 40 elected members of the House of Assembly can be Ministers of Government, a very rigid but perfectly safe way to rein in Ministerial excesses as at some point in time they will need to have their actions in the Cabinet approved by their colleagues in the form of Resolutions, Acts of Parliament and simple motions.

6.6 Our system, in this respect, has been improved from that granted with the introduction of the Ministers in 1967 which, at that time, provided for a Chief Minister and two other Ministers.

6.7 The changes granted in 1980, provided for an additional Minister and the Constitution at that time provided for a maximum and minimum number of Ministers, the variance being one. After the General Election of 1999, one other Ministerial position was added bringing the total to the present number which provides for a minimum of four and a maximum of five including the Chief Minister.

6.8 In 1979 with the introduction of the recommendations of the Deverell Report of 1973, the responsibility for Finance was transferred from the Governor to a Minister increasing the responsibility of Ministers in every respect. The general responsibility of Ministers is not only the responsibility for the Ministry but also the administration of all departments under that Ministry.

6.9 Essentially, the view is that an examination of this Issue cannot be properly done without investigating the possibility that some of the portfolios presently under the Governor's ambit, such as the Civil Service and the Police specifically, should be transferred to Ministers.

6.10 A corollary examination as well needs to be undertaken of the relationship between Ministers and Non-Ministers (i.e. backbenchers on both sides of the House and opposition leaders) as to checks and balances necessary to ensure that Ministers are accountable to the Legislative Council as a body for their decisions taken as Ministers in Executive Council.

6.11 During our public meetings, the prevalent view expressed was a perception that the arrangement of portfolios leads to inefficiency, as it appears that some Ministers are overloaded (particularly the Deputy Chief Minister) while others are not. There was also the suggestion many times that the Minister of Finance ought not to have any other portfolios which are "large" spenders, as is now the case with the Ministry of Health, to facilitate the principle of "good governance."

6.12 There seems to be no great opposition to a sixth Minister as the point has been made repeatedly that we already have in effect "seven or maybe eight Ministers" which includes the Governor, Deputy Governor and the Attorney General. The view that the additional Minister may well be a Minister of Home Affairs (or Legal Affairs) has been expressed equally with the provision that the portfolios be rearranged including Legal and Home Affairs (and the Civil Service). This is specifically recommended by Members of the Legislative Council.

6.13 Another pertinent view is that the framework for a sixth Minister already exists in terms of staffing in the Civil Service, the rearrangement of these positions being the only required exercise. As regards costs, it has been suggested by one Legislator, that the only cost variation would be the difference in salary between a Backbencher and the Minister, assuming of course that no extra members of the Legislative Council be considered. This has however been refuted by a submission from the Finance Department where a suggestion of extra cost is close to 1 million dollars.

6.14 One final consideration is the fact that in small societies like the Virgin Islands, we suffer from diseconomies of scale in every aspect of our life so that unit costs of providing services are shared by smaller numbers as opposed to larger Caribbean Governments. We must still deal with issues arising from the same matters which larger independent Caribbean counties exercise action over, but they provide these services on behalf of much larger populations as opposed to our 25,000.

6.15 It is the Commission's **recommendation,** therefore, that the sixth ministerial position be granted as this will, among the other considerations mentioned in paragraphs 6.11 and 6.12 above, add another voice to debates within the Cabinet, essentially furthering the democratic process. In order however to maintain discipline in the Cabinet and to ensure it's accountability to the Legislative Council, there should be a compensating addition of at least 2 seats in the Legislative Council, probably being added as At-Large seats or with

the two lesser populated sister islands of Anegada and Jost Van Dyke featuring as a prominent part of each of the two district seats, which may be added instead of two At-Large seats. An example of this would be the North Sound in Virgin Gorda combining with Anegada to become a New District, and Carrot Bay with Jost Van Dyke in a similar setting.

6.16 The fundamental reason for this consideration is that based on the principle of good governance, there should normally be an excess of back-benchers over ministers on the Government side. Granted however that this is unpractical unless the ministerial numbers are reduced or the total seats drastically increased, the best compromise is to add two seats to at least strive for some semblance of choice being available to the leader of Government business.

CHAPTER 7

Human Rights Chapter

ISSUE NO. 5 - The need for a human rights chapter in the Constitution.

7.1 This issue has received due consideration in the two previous reviews of the Virgin Islands Constitution. In the 1974 Report ("the Deverell Report") the then commission concluded at paragraph 92-

"While the BVI- if our recommendations are accepted-will not have arrived at a stage of full internal self-government, yet we are of the view that the stage has been reached when a Bill of Rights might be appropriately included and entrenched in the constitution."

7.2 In the 1993 Report the then commission had this to say at paragraph 9.1-

"There was virtually unanimous demand for the fundamental rights and freedoms, i.e. a Bill of rights to be included in any new Constitution. We entirely agree and recommend accordingly."

7.3 The 1993 commission very helpfully annexed to their report a draft 'Bill of Rights', which had been prepared for inclusion in the Cayman Islands Constitution. However, at present, the Virgin Islands, along with the Cayman Islands, are the only two Caribbean BOTs which do not have a Human Rights Chapter in their constitution. This is so even though the recommendation in the 1993 report was duly accepted by both the Legislature of the Virgin Islands and the UK Government. It is a matter of some concern that 11 years later the Constitution is still devoid of these important human rights provisions. The reasons for their non-inclusion to date are not entirely clear to the Commission. One view expressed to the Commission, is that there has been some reluctance on the part of the local government to push for its inclusion because of concerns over the implications (financial and otherwise) that certain of the provisions or rights may have on the administration of government and the constitutionality of certain laws. Another view speaks to its implementation being delayed because changes were being made within the Foreign and Commonwealth Office, to update the draft model chapter to take account of

provisions in the European Convention on Human Rights. Whatever the reasons or justifications, it is clear that the delay is inexcusable and ought not to be countenanced any longer.

7.4 Whatever may have been the thinking in the past, it is significant that all current members of the Legislative Council in their "Position Paper" submitted to the Commission in January 2005, accept that *"there is a need for a Human Rights Chapter to be included in the Constitution."* However, they go on to recommend a 'caveat', the terms of which would restrict the power of the courts to declare any legislation or statutory provision unconstitutional, null, void and of no effect. Such a restriction has not been advocated by any one else to, and does not find favour with, the Commission.

7.5 Their recommendation is in these terms-

"It is considered that where the Courts declare any BVI Legislation to be violative of the Constitution (especially its Human Rights Provisions) the Courts should under the same Constitution be mandated not to strike down or declare such violations unconstitutional, null, void, or of no effect as is the case in the United States or the Commonwealth Caribbean or Canada, but rather that the Courts should be required to adopt the new UK or New Zealand constitutional remedy of declaring the specific offending legislation to be incompatible with the Constitution thereby leaving the matter to the Legislature itself to remedy the defect. By this means the Court as a third branch of Government (whether it is the Supreme Court or the Privy Council) will not strike down any legislation enacted by the legislature as the second branch of Government, but will merely declare the incompatibility."

7.6 It seems to the Commission that this recommendation is based on an underlying misconception. In the UK there is no written constitution and Parliament is supreme. Hence, no law passed by Parliament can be declared 'unconstitutional' by the courts of the UK. In the United States, Canada and most of the independent Commonwealth Caribbean countries, it is not Parliament, but the constitution that is the supreme law of the land. The role of the courts in such countries is to interpret and give effect to the provisions of the constitution so as to protect its supremacy, by ensuring that laws passed by Parliament are not in violation of its provisions, especially, entrenched provisions, such as the 'fundamental rights and freedoms'. Likewise, in the Virgin Islands, the Legislature is not supreme. It is a colonial legislature created by subsidiary legislation of

the U.K., the Virgin Islands (Constitutional) Order 1976. As such, it is not correct to accord to the Legislative Council of the Virgin Islands the kind of supremacy accorded to that of the United Kingdom Parliament. Furthermore, we have a written Constitution which is the primary law of the land, from which the Legislature gets its authority to pass laws for the peace, order and good government of the Territory. It is the role and duty of the courts to interpret legislation passed by the Legislature and to pronounce on its constitutionality, where this has been appropriately challenged.

7.7 It seems to the Commission that Honourable Members may be concerned, to some extent, that certain existing statutes or statutory provisions, which the Legislature has passed in the best interest of the Territory or to protect the interest of the native Virgin Islander or Belonger, (such as laws which differentiate between or impose different standards or requirements as between Belongers and non-Belongers, or provides for the inheritance of property), may be challenged in the courts as discriminatory. In fact, this 'concern' has been addressed by article 16(4) of the draft Model, which provides for the non-application of the anti-discriminatory provisions to laws which make provision (1) for the appropriation of public revenues or other public funds, (2) with respect to Belongers, (3) with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters of personal law; or (4) whereby persons are subject to any disability or restriction or may be accorded any privilege or advantage that is "reasonably justifiable in a democratic society." See also sub-section (5) of that article relating to qualifications for service as a public officer or member of a disciplined force or for the service of a local government authority or a body corporate established by law for public purposes; and, also, sub-paragraphs (7) to (9) which similarly provide for the non-application of the anti-discriminatory protection provision in sub-paragraph (1).

7.8 Furthermore, many constitutions contain a provision which allows for existing laws to be construed, modified or adapted by the courts so as to bring them into conformity with the constitution. As an example, the relevant article of the Constitution of St. Lucia provides-

The existing law shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.

7.9 Thus, where provisions of a statute have been declared unconstitutional and are therefore void, the practice of the courts has been to remove the offending words where possible,

or to read into the provision such words as may be necessary so as to give effect to the intention of Parliament and, thereby, make the provision conform with the constitution. A recent example of this is to be found in the judgments of the Court of Appeal of the Eastern Caribbean Supreme Court and the Privy Council in the case ***R v Hughes*** (2001) 60 WIR 156. In that case, a section of the Criminal Code of St. Lucia providing for the mandatory imposition of the death penalty, was found to be unconstitutional and therefore void. However, the Privy Council (as did the Court of Appeal), applying the above provision, construed the offending section as modified by the deletion of the words "other than death', so as to make it no longer inconsistent with the constitution.

7.10 Accordingly, for the reasons advanced above, the Commission does not recommend the inclusion of the provision recommended by members of the Legislature restrictive of the powers of the courts to declare any law passed by the local legislature unconstitutional and, consequently, void.

7.11 The Commission, in its many public meetings and other public appearances and, also, in the written submissions received from members of the public, have not had one single dissenting voice to the inclusion of an appropriate Human Rights Chapter in a new Constitution. We too have found the support for the inclusion of such a chapter in the Constitution overwhelming, and so **recommend**.

7.12 The main focus of the Commission relative to this Term of Reference, has been two fold. Firstly, scrutinizing the 'Draft Model Chapter on Fundamental Rights' dated 15th May 2001, which was provided to us through the Governor's Office, and is said to be the latest draft emanating from the Foreign and Commonwealth Office which takes account of provisions in the European Convention on Human Rights. Secondly, looking at what other rights (apart from those standard to such a chapter), we in the Virgin Islands consider so dear that they ought to be considered one of our fundamental or human rights, and included in such a Chapter in any new Constitution. The Commission's critique on the Draft Model, and our recommendations thereon are set out as **a Schedule** to this Report. However, there are a few important matters addressed in the Draft Model which require more detailed treatment.

The Draft Model

7.13 Accordingly, the Commission makes the following comments and recommendations regarding certain provisions of the Draft Model:-

General- The Commission is not enamored with the Draft Model. The drafting leaves something to be desired. We, like the Attorney General, find it to be unnecessarily long-winded and too detailed in some of its provisions. The provisions, in particular the exceptions, ought to be stated in much simpler and clearer language. Having made those comments, we are conscious not to appear to be contributing to further delay in the adoption into the Constitution of a Chapter on fundamental rights and freedoms. Accordingly, we **recommend** that a revised draft chapter, taking into account the Recommendations in this report, be produced expeditiously for inclusion in the Constitution.

Article 5(3)- This provision deals with the right of a person arrested or detained to legal representation of his choice at his expense. In the Virgin Islands, there is no legal aid scheme in place. There has been for some years a Memorandum of Understanding between the Government and the BVI Bar Association, whereby legal aid is provided in relation to criminal and certain matrimonial matters. Funding for the 'scheme' is provided by Government, and the Bar, with the cooperation of chambers, provides the lawyers. There is clearly the need for a well established, properly funded and staffed legal aid scheme in the Territory, if the right to counsel is to be meaningful for those who cannot afford a lawyer. Accordingly, we **recommend** that Government set up a committee, consisting of persons from the private and public Bar and from social development or social services, to plan for the implementation of a legal aid scheme to suit the needs and requirements of the Virgin Islands.

Article 5(4) – This sub-paragraph deals with the stage at which a person arrested must be 'read' his rights. It specifies, *"as soon as he is brought to a police station or other place of custody"*. The Commission is of the view that a person arrested must be informed of his rights at the time of arrest, wherever that may be, and **recommends** that the draft be changed to so provide.

Article 5(5)- This provides for a person arrested or detained, for purpose of being brought to

court or upon suspicion of having committed an offence, and not released, to be brought *"without undue delay before a court."* The Commission notes that the Police Act (as amended in 2001) allows for a person to be detained by the Police without charge for up to 96 hours, subject to certain caveats. The Constitution of Antigua and Barbuda specifies 48 hours. The consensus of the Commission is that this provision should limit the period to no longer than 48 hours with provision for a court to extend the period of detention in the public interest. Accordingly, we **recommend** that the words *"and such period shall not exceed 48 hours unless extended by the court in the public interest"* be added to this provision.

Article 19 - Enforcement: This provision specifies which court will have jurisdiction to decide on human rights issues. We **recommend** that any reference to the "Supreme Court" must be defined and construed as a reference to the Eastern Caribbean Supreme Court, as a court of first instance to adjudicate on such matters. Further, the Commission is not content with the references in sub-paragraph (6) to our courts having to take account of decisions of the European Court of Human Rights, to which we understand, there is no right to petition from the Virgin Islands; or to the European Commission of Human Rights and the Committee of Ministers of the Council of Europe. These are all not applicable or extended to the Territory. We have our own court system with its hierarchy, which extends from the High Court to the Privy Council. Accordingly, we **recommend** that article 19 of the draft Model be replaced with a provision along the lines of article 16 of the Anguilla Constitution.

7.14 The consideration of 'additional' fundamental rights focused on two main areas: Environmental Rights and Educational Rights.

Environmental Rights

7.15 At the Commission's first public meeting, one young Virgin Islander felt strongly that a right to a clean and protected environment ought to be included in the list of fundamental rights to be enjoyed by all residents. The protection of such a right in the Constitution would enable any 'citizen' to take action against the government (or any other person) for its enforcement. Such a right is not without precedent. (See section article 24 of the Constitution of the Republic of South Africa 1996)

7.16 Concerns about the protection of the environment for future generations of the Virgin Islands, has been echoed by a few other persons at our public meetings. This view also found support in the report submitted to the Commission by the Human Rights Reporting

Coordinating Committee ("HRRCC") dated December 3, 2004. At paragraph (iii) they state-

> *"...the HRRCC is of the opinion that the Draft Model Chapter on Fundamental Rights (version: 15h May, 2001) does not address contemporary recognized human rights such as social and environmental rights."*

7.17 The suggestion that such a right ought to be included in a Human Rights Chapter is indeed laudable and one which the Commission finds attractive. It is beyond doubt that the environment in all its facets is essential to our very existence and prosperity as 'occupants' of these treasured islands called the Virgin Islands. It impacts, in a fundamental way, on the nature and quality of the life we enjoy as residents of 'Natures Little Secrets'. It is certainly critical to our economic well-being, as a country heavily dependant on tourism, and, in particular, water-borne tourism, as one of two main economic pillars. Any indiscriminate and unchecked damage to or destruction of key elements in our environment, is not only cause for concern, but for firm and measured protective, and even punitive, action against the violators. However, the view expressed most often to us when the inclusion of such a right in the Constitution is raised, is that such matters are best dealt with, at this stage of our development and resources, by appropriate legislation and not elevated to constitutional protection. While the Commission finds the argument for the inclusion of such a right attractive, it is also mindful of the financial and other implications which the elevation of such a right to constitutional status will have. Accordingly, the Commission supports the view that such matters are best dealt with, at this stage, by an appropriate, stringent and penal cadre of environmental legislation, and we so **recommend.**

Right to an Education

7.18 This is addressed at clause 12 of the Draft Model. It limits this right to primary education free of costs. The HRRCC in their report recommended that *"every child of the appropriate age (and residence status) be entitled to receive secondary as well as primary education."*

7.19 The Education Act, 2004 (No. 10 of 2004), which came into effect on 1st January 2004,

provides for a compulsory school age of 5 to 16 years and, by section 28, makes it mandatory for every child to attend school until the last day of the school calendar in the school year in which he attains 16 years of age or receives his diploma or certificate, whichever occurs first. By section 17(1), the tuition fees in respect of a child attending such a programme at a public school "shall not be charged to the student or the parents of the student." Thus current law provides for free education for students up to age 16 years attending a public school, which effectively means up to secondary level. The exception is that tuition may be charged in respect of "persons or classes of persons who are not citizens of any Member State of the Caribbean Community *as the Minister may prescribe by Order published in the Gazette."* (section 17(2)) Also, section 30 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, including on the grounds of *"race, place of origin, political opinions, colour, creed, sex, mental or physical handicap."*

7.20 There is no right to education protected in the constitutions of the BOTs of Anguilla, Montserrat and Bermuda, such a right being left to be dealt with under ordinary legislation. Likewise, in the constitutions of the independent Caribbean countries of Antigua and Barbuda and Trinidad and Tobago, by way of examples. The Commission recognizes that the absence of such a right from the constitutions of current and former colonies of Britain, does not presuppose that the inclusion of such a right in a new Virgin Islands constitution would not be in keeping with modern constitutional development. Indeed, more and more, persons advocate for the inclusion of what may be termed 'non-traditional' rights, such as the right to free education, which is considered key to national development and the full realization of some of the more 'traditional' human rights that are usually encompassed in a Bill of Rights.

7.21 Some members of the public felt strongly that the right to an education up to the secondary level, ought to be a constitutional right, while others felt that such a constitutionally protected right should, for economic reasons, be limited to the primary level. Still others were of the view that the entitlement to a free education up to whatever level is chosen, ought to be reserved for ordinary legislation and not elevated to constitutional protection. Of primary concern was the costs to the Virgin Islands to give full effect to such a right, and also the question of whether such a right ought to be applicable to any child within the territorial limits of the Virgin Islands or limited to Belongers and persons with appropriate residence status.

7.22 The Commission considers these to be all matters of legitimate concern. Certainly, the right to free education up to the secondary level in our public schools ought to be afforded to all Belongers of the Territory, children with residence status granted under the Immigration Act, or the children of such persons who have been permitted to reside with their parents and attend school in the Territory.

7.23 The educational resources and facilities of the Territory are limited to say the least. There are currently sixteen public primary schools for a combined enrollment of 2286, and three high schools (one each on Tortola, Virgin Gorda and Anegada) with a combined enrollment of 1579[20]. We are told that another high school is being planned for Tortola to relieve the congestion at the BVI High School in Road Town. Additionally, there is also the view expressed to the Commission by a small minority, that the constitutional protection of the right to free education ought to be extended to the tertiary level as well. However, this latter view does not currently find favour with the Commission.

7.24 Having considered the various recommendations from the public on this issue, the Commission is in general agreement with the recommendation of the HRRCC at paragraph (vi) (j) of their report. Accordingly, we **recommend** that every child of appropriate age and residence status in the Territory, as provided by law, ought to be entitled to receive primary education free of costs in the public schools; and, likewise, all Belongers up to the secondary level. However, we do not recommend that this be elevated, at this stage, to constitutional protection, as this matter is and can be adequately addressed in the Education Act.

Positioning of the Human Rights Chapter

7.25 This has not been an issue for the Territory, as it has been for others such as Montserrat, since hitherto the fundamental rights and freedoms have not been incorporated into the Constitution of the Virgin Islands. As this will be the first time, we **recommend** that this Chapter be positioned at the beginning of the new Constitution, immediately after the provisions dealing with Belonger status, thereby giving its provisions the kind of prominence such important rights deserve.

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[20] Exam and Statistics Unit – Department of Education and Culture, Government of the Virgin Islands.

CHAPTER 8

The Governor's Special Responsibilities and Reserve Powers

ISSUE NO. 6 - *Having regard to the reserve powers of the Governor, to consider the feasibility of scaling down those powers and establishing a viable system of checks and balances to ensure continued good governance.*

8.1 Discussions with the public as it relates to the Governor's constitutional role focused primarily on the special responsibilities as outlined in section 19 and the reserve powers as outlined in section 44. The Commissioners pondered many other constitutional issues that relate to the Governor's role.

Administering the Government of the Virgin Islands

8.2 The Commission pondered whether the administering of the government should remain with the Governor, as outlined under Section 3 (2) of the Constitution, or whether the Governor's administrative role should be related only to administering his special responsibilities and the administering of the affairs of the Virgin Islands be fulfilled by elected representatives. It is the Commission's view that the Cabinet should be the body administering the Territory's affairs and that the Governor's administrative role should be related only to his special responsibilities. We **recommend** that Section 3 (2) be so changed to reflect this view.

Formulation of Policy

8.3 Section 7 provides for the exercise of the Governor's functions. Sub-section (1) places the Governor in a primary role of formulating Government policy. This provision is out of step with the political expectations of current day Virgin Islands. Political parties campaign on certain platforms which they expect to use as the basis of formulating policies for Government through Executive Council. Also, the Commission heard complaints that Ministers have difficulty implementing policies because of stonewalling by civil servants who ultimately are answerable to the Governor. It is the view of the Commission that the formulation of policy, insofar as it relates to every aspect of

Government, except those which may fall under the Governor's special responsibilities, should be constitutionally reposed in the Cabinet and we so **recommend**.

The Public Service - Powers to constitute offices and make appointments

8.4 Sections 9 and 19 (1)(d) gives the Governor the responsibility for constituting offices within the Public Service, hiring, disciplining, firing and terms and conditions of service. As a result of an amendment in 2000 to section 52 (2), the Constitution now allows for the Governor to delegate any of the powers vested in him to make appointments to public offices and to remove or exercise disciplinary control over persons holding or acting in such offices. The Governor is supported in his role as the employing authority of the Public Service by the Deputy Governor and the Director of Human Resources, who serve as his chief policy advisors on the organization and management of the Public Service. The Deputy Governor's Office and the Department of Human Resources work together with line managers to achieve and maintain a Public Service that is merit-based and non-partisan. Currently managers have the responsibility to use their judgment to make staffing decisions within a framework of merit-based policies and guidelines, while being held accountable for their decisions.

8.5 The Commission found that the general public feels that there needs to be more local control over institutions of state. Throughout the course of public meetings in the Territory, most persons stated that the responsibility for constituting offices within the Public Service should no longer be reposed in the Governor, but should be reposed in a Minister, subject to checks and balances.

8.6 The Commission sought the views of the Virgin Islands Civil Service Association as well as the views of the Deputy Governor and Top Managers of the Government, as it relates to removing the Civil Service as one of the Governor's areas of special responsibility. While our attempts to meet with the Virgin Islands Civil Service Association were unsuccessful, we did receive a written submission from its outgoing President. We held two meetings with the Deputy Governor and Top Managers. We asked them whether they considered the Virgin Islands to be at the level of development where authority can be moved from the Governor as provided under section 19 of the Constitution, and to a Minister having direct responsibility; or a Public Service Commission which would be vested with executive authority, still having to report to a Minister, who will ultimately

report to the Legislative Council on matters relating to the Public Service.

8.7 The Top Managers were helpful in sharing their knowledge of what obtains in territories that have an Executive Public Service Commission. Some Caribbean leaders (Antigua, St. Lucia, Grenada) are of the opinion that Public Service Commissions are a "stumbling block to reform" exacerbated by their constitutionally protected executive status. It was the view of the Top Managers that the underlying problem with executive public service commissions in these territories is the lack of support from their Human Resources Departments. It was their view that an executive Public Service Commission would work best in tandem with a human resource management system that is efficient and flexible, which would better meet the needs of ministries and departments.

8.8 Members of the Legislature see the need for "a Public Service Commission with executive authority, broad-based membership, broad powers, and a long life with reporting responsibility to the Chief Minister;" along with a system of appealing the decisions of the Public Service Commission.

8.9 Currently the Public Service Commission consists of 5 persons who serve in an advisory capacity. A Public Service Commission vested with executive authority to hire, fire and discipline civil servants was primarily favoured. Most people felt that the membership of the Public Service Commission should be increased to 7. Among the membership should be representation from the business community, the legal profession and a sister island. The general view as it relates to appeals, was that there should be an Appeals Tribunal of 3 persons and that the final level should be the court. The Commission **agrees** with these proposals and so **recommends.** It is also **recommended** that the life of any Public Service Commission should be set at 5 years.

8.10 The Commission agrees that the powers and functions, under sections 9 and 19 (1)(d), currently reposed in the Governor should no longer be part of the Governor's special responsibilities and so **recommends**. Whilst we agree and **recommend** that the Public Service Commission should be given executive authority, we **recommend** that the current movement towards giving department heads greater autonomy to hire junior and mid-level personnel should remain unchanged, as it is viewed as one way of ensuring greater efficiency. We also **recommend** that the Public Service Commission report to the Chief Minister, who will be responsible for overall policies and reporting to the Legislature. We also consider that Line Managers should remain accountable to the

Public Service Commission. Permanent secretaries and department heads should be appointed with the consultation of the Chief Minister. In light of these proposals, Section 53 will need to be changed, and we so **recommend**.

8.11 Concerning Appeals from decisions of the Public Service Commission, we **recommend** that appeals should lie to an Appeals Tribunal consisting of three members one each nominated by the Governor, Chief Minister and Leader of the Opposition. Concerns were voiced about the availability of senior managers within the service. In particular, members of the Legislature were of the view that there should be a pool of 10 top managers who could be rotated as needed for greater efficiency. We see merit in Ministers having a choice of highly trained senior staff. However we do not regard this issue as one that needs to be addressed by the Constitution.

Other Special Responsibilities

8.12 In addition to *terms and conditions of service of persons holding or acting in public offices* Section 19 outlines four additional areas of responsibility for the Governor:

- External affairs
- Defence, including the armed forces
- Internal security, including the Police Force
- The administration of the courts

External Affairs

8.13 There were few objections for this subject to remain as one of the Governor's special responsibilities. Currently, Regional affairs are dealt with by the local Government. Some persons expressed the view that the Virgin Islands' elected representatives ought to have a voice in meetings related to international external affairs, and should be a part of discussions that will result in major decisions or agreements that will have a direct impact on the economic and social well-being of the Territory.

8.14 Members of the Legislative Council hold the view that in matters relating to the Financial Services Sector, the BVI Government is competing with the UK Government, and that

what is in the UK's interest may not necessarily be in the Territory's interest. The Commission agrees with the Members of the Legislative Council that the Territory needs to be much more involved in its external affairs by sitting at the table and making its own representation, particularly in matters of Financial Services, regional and inter-Caribbean affairs. We so **recommend.**

8.15 Members of the Legislative Council also think that the Chief Minister should be responsible for External Affairs. It is the Commission's view that the Governor and the Chief Minister should share this subject. Given the Territory's status we recognize that there will be instances where the UK will have to represent the Territory. We **recommend** that this shared responsibility for External Affairs be constitutionally recognized with the Chief Minister being primarily responsible for matters of Financial Services, regional and inter-Caribbean affairs.

Defence, including the armed forces

8.16 There was a general consensus that this subject should remain as one of the Governor's special responsibilities.

Internal security, including the Police Force

8.17 The vexing problem of an increase in serious crime in the Virgin Islands gave rise to much discussion at every public meeting and many of the Commission's deliberations. Members of the public were concerned that one individual is responsible for something that is so critical to the functioning of the Virgin Islands as a society and country as internal security and the functioning of the Police Force. There is a very great fear that Tourism, Financial Services and the general quality of life will be severely impacted by a continued increase in crime.

8.18 The people expect Ministers to give an account on what is taking place to better manage crime but, in fact Ministers are not constitutionally responsible. Under the current system, the Commissioner of Police is responsible to the Governor, who is responsible to The United Kingdom Government and not the people of the Territory. The Governor has no audience in the Legislative Council and hence neither does the Police Force.

8.19 The Commission is aware of the weekly security briefings that include the Governor, Chief Minister, Deputy Governor, Attorney General and the Commissioner of Police. Members of the Legislative Council are of the view that these meetings do not truly afford the Government the level of input in making a significant difference with respect to good and better policing. Members of the Legislative Council also hold the view that the responsibility for the Police Force should be transferred to a Minister. The Commission is mindful of the public's view of "a one man rule" in this area and is sympathetic to the public's concern about the Police Force becoming politicized. It is the Commission's view that there should be a sharing of responsibilities for internal security, so that elected representatives can have a direct say in the decision making and policy making in relation to Internal Security and the Police Force. We so **recommend.**

8.20 The Territory is at the stage where constitutionally the matter of internal security needs to be addressed to suit the times. There needs to be a broad-based body charged with the responsibility of formulating policies in relation to internal security and the functioning of the Police Force. It has been proposed that there be a National Security Council that will be comprised of the Governor, the Chief Minister and one other Minister (who will be responsible for the subject in the Legislative Council), the Attorney General and the Commissioner of Police as non-voting ex-officio members. The Commission agrees and **so recommends.**

8.21 The day to day operation of the Police Force should remain the responsibility of the Commissioner of Police who, it is our **recommendation,** shall be directly accountable for its operation to the National Security Council and the Constitution should so provide.

8.22 The Commission also **recommends** that the established weekly briefings and all briefings on matters of Internal Security including the police shall be made by the Commissioner of Police to the National Security Council and the Constitution should so provide.

8.23 It is the view of the Top Brass of the Police Force that there needs to be a Police Service Commission. This advisory body would address problems within the Police Force. The Commission **recommends** that a Police Service Commission be created and given constitutional recognition. It should be primarily responsible for hiring, promotions, disciplinary issues within the Police Force and liaising with the general public. A Human

Resources Department within the Police Force will be needed to support the Police Service Commission. It is evident from the number of reports of abuse, that psychological profiling must be part of the hiring process, and we so **recommend**.

8.24 There are two levels of police officers: the gazetted ranks and the non-gazetted ranks. The gazetted ranks include Superintendent, Duty Commissioner and Commissioner. Non-gazetted ranks include officers below the rank of Assistant Superintendent. The Commissioner has ultimate authority with regard to these ranks, especially as it relates to the promotion of these officers. Promotions among the gazetted ranks are recommended by the Public Service Commission.

8.25 We **recommend** that Non-Gazetted officers who are to be hired should be reviewed by the Police Service Commission, who will advise the Commissioner. Gazetted Officers who are to be hired or promoted should be approved by the National Security Council. The Constitution will have to give effect to this recommendation.

8.26 The Police Act (Chapter 165), which governs the Police Force, addresses Offences and Discipline. Section 39 speaks to Appeals. The Commission **recommends** that the process of Appeals be changed so that Non-Gazetted officers should appeal to the Police Service Commission and Gazetted Officers should appeal to the National Security Council.

8.27 It is **recommended** that the Police Act should be amended as necessary to give effect to these recommendations.

8.28 The Commission would like to emphasize that the liaising function of the Police Service Commission should have equal weight to its other roles. Past experience with a Police Advisory Committee indicates that the public is more likely to speak freely with fellow citizens than the police officers.

The administration of the courts

8.29 There were mixed views about whether this subject should remain as one of the Governor's special responsibilities. Members of the Legislature advocate that "*the Administrations of the Courts should be assigned to a Minister (of Justice/Legal Affairs/Home Affairs) who inter alia*,

(a) *would be subject to the recommendations of the Judicial and Legal Service Commission;*

(b) *would see to the provision of adequate facilities for the operating of the justice system*

(c) *would have reporting responsibility for the Court system: the High Court, the Magistrate's Court and the proposed commercial, juvenile, family and small creditors courts."*

8.30 The Commission considers that in matters relating to the administration of the courts the overriding responsibility should remain with the Governor. We so **recommend.** We note that pursuant to the proviso to section 7(1) of the Constitution, the Governor is obliged to consult with the Chief Minister when exercising his powers in relation to any of his special responsibilities, including this one.

8.31 Whilst the Constitution gives the responsibility for the administration of the courts to the Governor, it does not speak to the courts or judiciary. Paragraphs 10.69 to 10.71 of this Report outline the Commission's views and recommendations on this issue.

Governor's Reserved Powers

8.32 The Governor's Reserve Powers are exercisable only in relation to his special areas of responsibility (section 19). There are checks and balances in place in relation to the Governor's exercise of his Reserve Powers. He must first make a written submission of his declaration to Executive Council for approval. If Executive Council does not advise him in a timely manner, he may submit his declaration to the Secretary of State for approval. If he feels that that matter is urgent, he may make his declaration without obtaining the authority of a Secretary of State and submit his reasons for making his declaration to a Secretary of State after it has been made. There is no known instance of this provision ever being used in the Virgin Islands.

8.33 There were no objections to the provisions for the Governor's reserve powers. In fact the Members of the Legislative Council did not make any comment about the Governor's Reserve Powers as outlined in section 44.

8.34 The Commission is very mindful of the UK's responsibility with respect to contingent financial liabilities and the view that such a responsibility will mean there should be regard for reserve powers. We understand the fear that there could be a breakdown of law and order which could result in capital flight and a downturn in tourist arrivals. We hasten to add that in fact no modern society is immune from such a possibility. Should such a possibility serve as a deterrent to desired constitutional advancement? We think not. In this era of "modern partnership", we hope that the four fundamental principles outlined in 1.19 of the White Paper on "Partnership for Progress and Prosperity" still hold true: "*self determination; mutual obligations and responsibilities; freedom for territories to run their own affairs to the greatest degree possible; a firm commitment from the UK to help territories develop economically and assist them in emergencies.*"

8.35 In the event that the Commission's recommendations for transferring the responsibilities for the Public Service and/or the Police Force from the Governor are accepted and implemented, we see no reason to retain Section 44 in a new Constitution. We so **recommend**. The over-arching provision for the full power of Her Majesty to make laws for the peace, order and good government of the Virgin Islands will certainly ensure that ultimate authority still lies with Her Majesty.

CHAPTER 9

Cabinet System of Government for the Virgin Islands

ISSUE NO. 7 - *Considering the existing system relating to the functioning of the Executive Council, to provide a critical analysis on the feasibility of establishing a cabinet system of government for the British Virgin Islands.*

9.1 This Term of Reference requires that the Commission examine the existing system as it relates to the exercise of Executive Authority, the role and functioning of Executive Council and its obvious importance to the functioning of Government, and then to go on to consider whether it is feasible to introduce a Cabinet System of Government to replace the Executive Council, where the Chief Minister and not the Governor presides over the Cabinet.

The Executive Council.

9.2 The composition and function of the Executive Council is addressed in Part III of the Constitution. It consists of the Chief Minister and not less than three nor more than four other Ministers, and the Attorney General.

9.3 In the Virgin Islands, as in each of the British Overseas Territories and most independent Caribbean nations (including, for example, St, Kitts & Nevis, Antigua & Barbuda, and Barbados), Executive Authority is vested in Her Majesty. In the Virgin Islands, Executive Authority is to be exercised on Her Majesty's behalf by the Governor *"either directly or through officers subordinate to him."* (section 13)

9.4 In each of the independent Caribbean nations, a Cabinet, headed by a Prime Minister, is established to determine the policies and set the rules and guidelines for governance of the nation.

9.5 With the sole exception of Bermuda, the Governor, while not a member of the Executive Council, convenes and presides over each sitting of the Council. In Bermuda, the Premier presides at meetings of the Cabinet.

9.6 In the Virgin Islands, as in each of the BOTs, for the formulation of policy, an Executive Council is established as an advisory body to the Governor as Her Majesty's Representative, except as it relates to the Governor's areas of special responsibility. As provided in the Constitution, the Governor is obliged to follow the advice of the Executive Council. The Governor is not required to seek the advice of Executive Council (but to consult with the Chief Minister) in relation to any of his five areas of special responsibility; nor where the matter is prejudicial to Her Majesty's Service or is deemed a matter of urgency.

The Guiding Principles

9.7 The major premise for the establishment of a Cabinet System can be found in Chapter X1 of the Charter of the United Nation's (Declaration Regarding Non Self-Governing Territories). By virtue of Chapter X1, qualifying member States are committed:

(a) *To develop self-government in the affected territories*
(b) *To take due account of the political aspirations of the peoples, and*
(c) *To assist them in the progressive development of their free political institutions, according to the political circumstances of each territory and its peoples and their varying stages of advancement.*

9.8 The guiding principle in the White Paper on Partnership for Progress and Prosperity between Britain and the Overseas Territories, is the acceptance of responsibilities on both sides. It explains that there must be a balance of obligations and expectations which should be clearly and explicitly set out:

(1) *On one hand the United Kingdom retains responsibility for the international and external security, the international affairs and obligations of the territories and work with them to develop their prosperity. Proposals for constitutional change should not undermine Her Majesty Government's ability to exercise those responsibilities.*
(2) *Equally, Overseas Governments are responsible for the internal affairs of the territory. Consideration should be given to ensuring that there are adequate powers and duties to carry out this responsibility and ensure the safety, protection, education, health, livelihood and quality of life of all citizens and others resident within the boundaries.*

9.9 As for the people of the Virgin Islands, the overriding guiding principle, based on the principle of self-determination, is the assertion that if persons are elected to represent their interest and are held accountable at least once every four years, then they should be granted the authority required to fulfill their obligations.

The Challenge

9.10 Given that there is currently no general or specific political mandate for independence, would the establishment of a Cabinet System of government assist the Virgin Islands in the progressive development of their free political institutions, while not undermining Her Majesty's Government's ability to exercise its responsibilities?

9.11 In a Cabinet System where the Chief Minister replaces the Governor as Chairman, consideration should be given as to whether the executive or legislative powers held and exercised by the Governor, are adequate in respect of: -

(a) his remaining responsibilities under the Constitution;
(b) the authorization of expenditure required to enable him to discharge his responsibilities in each of his special areas;
(c) good governance;
(d) periods of public emergency;
(e) public order; and
(f) the use of the power of disallowance.

The Debates and Submissions

9.12 In the debates and submissions, it is noted that there was no challenge to Executive Authority being vested in Her Majesty. Indeed, the challenge, and hence the discourse, was on the question as to how Executive Authority should be shared as between the Governor and the Cabinet.

9.13 In our meeting with the Governor he emphasized that there is no reason for the UK to maintain a colonial presence in any of its remaining Overseas Territories, and it has no

strategic interest in doing so.

9.14 The Governor explained that there is nothing that is keeping the United Kingdom from granting independence to the Virgin Islands. He added that if the Commission's report was to reflect forms of Government with which the United Kingdom's Government is unhappy, then the sensible course would be to separate the link between the UK and the Virgin Islands, in other words, "independence". On this point he concluded that if the Virgin Islands is seeking independence from the UK, then it should take independence, because the UK Government would have no problem with it.

9.15 The Governor stated that the principal concern of the UK Government is retaining sufficient authority to guard against the Overseas Territories becoming a liability, through financial mismanagement, political instability, corruption or in circumstances of natural disaster.

9.16 His Excellency mentioned that his role vis-à-vis the Executive Council is regarded as being very valuable, because it is a primary means of ensuring that any potential disagreements between the UK and the Government of the Virgin Islands can be thrashed out before they become a crisis, and the Governor is kept informed about the Government's priorities and concerns. The Governor can warn if conflict with the United Kingdom looks likely. He added that the Governor also adds value to the deliberations and decision-making in terms of experience and independence. However, he explained that the Governor is not a member of the Executive Council, and stated that if Ministers wanted to take a particular decision, then the Governor would not stop them, he can only warn and flag problems.

9.17 In our discourse with members of the Legislative Council, the Chief Minister noted that successive Virgin Islands Governments have demonstrated their progression and ability to manage the Territory in balancing their budget, and the Territory was excelling internationally in many areas. He noted that this demonstrated ability was gradually being accepted in some quarters of the British Government.

9.18 The Leader of the Opposition stated that the Virgin Islands was ready for a Cabinet system of Government and all that it entailed. He did not see why this should be withheld. He suggested that it was time for the Governor to no longer preside over Executive Council meetings.

9.19 One Legislator noted that the Governor, though not a member of the Executive Council, is the Chairman and controls the setting of the agenda. The Legislator concluded that it was time for the Governor to be removed from Executive Council, especially since he is not a Member.

9.20 At the Commission's last public meeting it was expressed by the Leader of the Opposition that the time has come for Executive Council ("the Governor- in-Council") to be replaced by a Cabinet with six Ministers and the Chief Minister to preside, with a very senior and experienced Civil Servant as Cabinet Secretary, who will be responsible to the Chief Minister for the administrative work of the Cabinet. He stated that once a Cabinet System has been accepted and introduced, the locally elected Government will be in charge of all of the affairs of the Territory.

9.21 In one noted submission, it was concluded that the Cabinet System would not represent further devolution of authority and, in that case, the question to be considered would be whether any other benefit is to be derived from it and whether it would be cost effective.

9.22 This submission goes on to state that the long and short of the matter is that the Constitution allows the Governor to do as he sees fit when the need arises. It was stated further that there is a huge difference between full cabinet government where the Ministers have the last word, and government in a non self-governing territory, where the Governor or the Secretary of State in the United Kingdom has the last word. It is the difference between being independent and being a colony.

9.23 The conclusion reached by this submission was expressed as follows:

"The long and short of the matter is that both in Bermuda and the Virgin Islands the Governor can do as he sees fit when the need arises. So in essence the Bermuda legislature is nothing more than the Virgin Islands legislature cleverly dressed up in fancy clothes.

In effect, what the administration of the Virgin Islands achieves in 2 bites, the administration of Bermuda achieves in 4- House of Assembly, Senate, Governor's Council and Governor. What was needed to consider is whether there is some real advantage in buying these dress up clothes, when ultimately the powers of the Governor

remain the same, as long as we are a colony.

There is a continuous waxing and waning of the authority of ministers. It may be more worthwhile and definitely more interesting, from a research perspective, to keep what we have until we get serious about independence".

9.24 Other views expressed by the public were to the effect: -

- The Virgin Islands should have a Cabinet System of government and if the Governor has a submission to make before the Cabinet, then he may be invited to present it;

- The issue of whether the Attorney General ought to continue as a full member of Executive Council or whether he should be an ex-officio member, as is the case with the Legislative Council, should be considered.

- Where a Cabinet System is adopted, the Governor will need to be informed in advance, of the matters coming before Cabinet and in that regard:-

  (1) the Governor should be given all papers before the meeting; and
  (2) the Governor should be informed within as reasonable a time as possible, of the decisions taken in Cabinet.

- Any concerns regarding the safe-guarding of the interest of the UK Government in the deliberations of the Cabinet, can be adequately addressed by having a resident United Kingdom Government's Representative sitting in on Cabinet meetings as an ex officio member.

The Recommendations

9.25 Recommendations for the establishment of a Cabinet System of Government are based on the premise that this would demonstrate the UK's commitment to fulfilling the mandate of providing an effective transition to self-determination if and when the people of the Virgin Islands, by referendum, should so decide.

9.26 Analysis of the oral and written submissions presented show that:

- No substantial evidence was submitted to suggest that Her Majesty's Executive Authority would be compromised if a cabinet system is established, where the Governor is absent from meetings of Cabinet presided over by the Chief Minister.

- The introduction of a resident UK Government's Representative as an ex-officio member of the Cabinet should serve to ensure that such interests are represented in the deliberations, and any issues of potential conflict are made known as timely as possible, thereby alleviating the perceived disconnect between the Governor's Office and the Cabinet. This matter is further developed at paragraph 10.21.

- Effective and potent checks and balances should be formulated to safeguard the UK Government's interests and its international obligations; and, likewise, for the maintenance of good governance and the vital interest of the Virgin Islands.

- It is highly feasible that a Cabinet System of Government could be established in and for the Virgin Islands.

9.27 Given the guiding principles and following public meetings, debates and submissions, the Commission **recommends** as follows:

(1) Executive Authority for the Virgin Islands shall continue to be vested in Her Majesty;

(2) Executive Council shall be replaced with a Cabinet consisting of the Chief Minister (or Premier) and not less than four and not more than five other Ministers, with the Attorney General and a resident representative of the United Kingdom Government in and for the Virgin Islands ("the Resident") as a non-voting ex officio members;

(3) The Chief Minister (or Premier) shall preside at all meeting of the Cabinet and in his absence the Deputy Chief Minister shall preside. In the absence of both, another Minister designated in advance by the Chief Minister shall preside;

(4) Section 23(3) of the Constitution should be amended to provide for a quorum at meetings of the Cabinet to consist of three Ministers present besides the Chief

Minister or other person presiding.

(5) *The Cabinet shall meet regularly and shall not be summoned except by the authority of the Chief Minister acting in his discretion: Provided that the Chief Minister shall summon the Cabinet if the Governor so requests;*

(6) *There shall be a Cabinet Secretary who shall be a senior public servant appointed on the advice of the Chief Minister who shall attend all meetings of the Cabinet and be responsible for the management of affairs of the Cabinet including the record keeping of deliberations and decisions of the Cabinet;*

(7) *The principle of collective responsibility shall apply to decisions of the Cabinet;*

(8) *The Governor shall be presented, in advance of each Cabinet meeting and at the same time as the members of the Cabinet, with all papers and supporting documents being tabled or considered at meetings of the Cabinet including the agenda;*

(9) *The Governor shall be kept regularly informed of all decisions of the Cabinet which shall be promptly communicated in writing to him by the Cabinet Secretary and, in any event, not later than within forty-eight hours of the conclusion of the meeting at which such decision was made;*

(10) *The Cabinet shall not make any decision regarding any matter which falls under the Governor's special responsibilities, unless such decisions relate to a question of funding specifically requested by the Governor for any such matter;*

(11) *Where the Governor requests in writing addressed to the Chief Minister and copied to the Cabinet Secretary, that any matter on the agenda for discussion at a Cabinet meeting should be deferred or not proceeded with as infringing on or adversely affecting the exercise of any of the Governor's areas of special responsibility or is likely to be prejudicial or cause embarrassment to Her Majesty or the Government of the United Kingdom in the discharge of any of its international treaty obligations, the Cabinet shall not deliberate or make any decision thereon, unless a decision on such deferred matter is subsequently sanctioned by the Governor or the Secretary of State;*

(12) In all matters relating to internal security and the Police, the Cabinet shall act in accordance with the policy decisions of the National Security Council; and

(13) All references to the "Governor" are to be construed as meaning "Her Majesty's Representative in the Virgin Islands".

CHAPTER 10

Other Issues Meriting Consideration

10.1 The Terms of Reference charged the Commission to not only address the seven specific Issues covered in Chapters 3 to 9, but to review the entire Constitution *"with a view to ensuring the British Virgin Islands' continued advancement and good governance"* As such, the Commission invited the public to address any other issues related to the Constitution. This led to certain issues being raised at the public meetings, although, in all fairness, time often did not allow much opportunity to do so at such fora, let alone permit discussion of such issues in-depth.

10.2 However, several additional issues were raised in memoranda submitted to the Commission. In particular, the Members of the Legislative Council addressed no fewer than seven such issues in their Position Paper (Appendix 3). Their submissions were accompanied by a copy of the Council's internal 'Restricted' memorandum, making a case for the establishment of the Office of the Legislative Council as an autonomous commission or body, operating separate from the Public Service, similar to what pertains in Barbados.

10.3 Additionally, an elected Member submitted two separate memoranda, one making a case for a bi-cameral Legislature, with useful draft amending provisions attached, and the other suggesting the basis of a definition of an '*indigenous Virgin Islander*'.

10.4 In addition to his appearances before the Commission, we received very helpful written memoranda from the Attorney General commenting on and making a case for important changes to the following constitutional provisions: section 17(1) - Deputy Chief Minister performing the functions of Chief Minister during his absence from the Territory; section 18(1) – the meaning and effect of a Minister being assigned, *inter alia, "responsibility for the administration of any department of government";* section 28 - qualifications for elected membership; and section 29 – the time for challenging a person as being disqualified for elected membership of the Legislative Council.

10.5 Equally helpful and scholarly, are the detailed written submissions by Mr. Jamal S. Smith, a local lawyer and only one of two members of the legal profession to make

recommendations to the Commission. In his memorandum (copied to the President and Vice President of the BVI Bar Association), Mr. Smith addressed a wide range of issues including national symbols, territorial boundaries and territorial integrity, nationality and citizenship, fundamental rights and freedoms with accompanying detailed draft chapter, transferring to a Minister the Governor's responsibility for internal security and external affairs, the inclusion in the Constitution of provisions as to the frequency and type of sittings of the Legislative Council, increasing the number of representatives in the Council to fifteen, changing to a Cabinet System, providing for flexibility in the number of Ministers to be appointed rather than specifying a maximum number, providing constitutionally for a system of producing a budget and for controlling governmental expenditure, expressly providing in the Constitution for the Judiciary, providing for a National Security Advisory Commission, providing in the Constitution for 'functional cooperation' internationally, regionally and with the neighboring US Virgin Islands, prescribing the manner in which the Constitution can be amended and for the periodic review of the Constitution through an established 'Constitutional Review Commission'.

10.6 The Chief Auditor, in her memorandum to the Commission, in addition to making recommendations on each of the seven specific issues in the Terms of Reference, made substantive recommendations on certain financial matters, such as providing in the new Constitution for payments on the Public Debt from the Debt Service Fund established by the Ministry of Finance, amending section 57 to provide for payments made from the "Pension Fund" to be established by the Government to be paid out of the Consolidated Fund, ensuring that all references in the Constitution to the "Auditor" are changed to "Auditor General", and changing section 67 to provide for the Annual Audit Report to be submitted directly to the Speaker for submission to the Legislative Council at the next sitting.

10.7 Some additional issues were also raised in the opening statements delivered by panelists at the Mass Public meeting held by the Commission in Road Town in January 2005. Copies of the presentations by the Leader of the Opposition and by Miss Eugenia O'Neal and Mrs. Medita Wheatley were subsequently made available to the Commission.

10.8 Likewise, the Commission itself identified a number of issues as matters meriting consideration, and solicited the views of the public regarding each such issue.

10.9 While we do not consider that all the issues raised require the fullest consideration, the

Commission has attempted to address most of them to some degree, and to make recommendations or give our comments thereon, however brief they may be. Some such issues may be considered more matters of form, while others are substantive and merit more in-depth consideration.

Table of Contents or Schedule to the Order

10.10 The value of having a Schedule of Sections to the new Constitution is clear. It greatly assists the reader when searching for particular provisions and facilitates a better acquaintance with the document and its provisions. This can be especially useful to students, as well as professionals. Accordingly, we **recommend** the inclusion of a Schedule of Sections at the very beginning of the new Constitution.

Preamble to the Constitution

10.11 In his remarks at the official launching of the Commission, the Chairman espoused the view that the Constitution ought to reflect the aspirations of the people of the Virgin Islands and the level of development of the Territory. During the Review, several persons felt strongly that the Constitution must, in a Preamble, speak to the essence of who we are as Virgin Islanders, our heritage, cultural identity, and mores and our collective aspirations. Miss Eugenia O'Neal in her presentation paper put it this way-

Our constitution should reflect who Virgin Islanders are as a people, our hopes, our values-whether or not this is done in the context of our continued and evolving relationship with the UK or independent of the UK. And I want our constitution to sing, to call to me, to inspire me and make me proud in a way that the present document does not.

10.12 In his memorandum, Mr. Jamal Smith expressed "*a desire to see a constitutive text for the Virgin Islands embodying the wishes and ideals of the Virgin Islands.*" In referring to the importance of national pride and nation building, Mr. Smith alluded to the importance of 'national symbols', such as, a Territorial Flag, an Official Language, Official Motto, Official Seal, Territorial Anthem etc., each reflective of the history, culture and aspirations of the people of the Virgin Islands.

10.13 There can be no question that our Constitution, as is the case with many constitutions of non-independent countries, is a rather 'dry', legalistic, uninspiring and, in some respects, convoluted document. It does not speak in any way shape or form to the history, heritage, culture and mores of the Virgin Islands or native Virgin Islanders. The Commission wholeheartedly accepts and **recommends** that a new Constitution must speak to who we are, both as a country and as a people. This is essential to nation building and the march to self-determination recognized as a fundamental principle in the White Paper on Partnership for Progress and Prosperity.

10.14 More and more we see a focus locally, encouraged by Government and civil society alike, on what makes us Virgin Islanders, who and what events in our past played a significant role in shaping, not just the image, of these Virgin Islands, but the very essence and being of the native Virgin Islander and, hence, this country. What makes us 'different', while at the same time sharing both a common heritage and many similarities with our fellow Caribbean people? Attributes such as self-reliance, neighborly spirit, independence of thought and action, a strong connection with the land, and the sea, are certainly part of what make up the character and cultural identity of the Virgin Islander. The ownership of land and of business, engendering a sense of 'belonging' and of having a stake in this country and its future development, are all undeniably at the core of shaping who we are and what this country has become. Most importantly, is the acceptance of Christian teachings and principles, a belief in God, which underpins our society and shapes our morals and respect for the sanctity of the home and for the rule of law.

10.15 To a large degree this is what Issue No. 3 in the Terms of Reference is speaking to, by asking us to reflect on such matters and, if possible, to formulate a definition of an 'indigenous' Virgin Islander. While a useful 'legal' definition may elude us or may not be practical in the context of who should be eligible to hold elected membership in the Legislative Council, we know who we are talking about when we use the term "Virgin Islander". Because of our recent history, many to whom that classification applies, were not born in the Virgin Islands, but are of a direct Virgin Islands lineage (be it parent or grandparent), and so can legitimately claim to be 'of' the Virgin Islands. The Constitution must therefore speak, in some meaningful way, to who we are as a people and a country. This is usually achieved through an appropriately worded 'Preamble' to the Constitution, and we so **recommend.**

10.16 The Commission has not had the benefit of a suggested draft Preamble, although, at our first public meeting, one young lady who raised this issue, was asked to prepare and submit a draft to the Commission. Doing the best we can, this is our **recommended** draft Preamble to the new Constitution:

Draft Preamble

Whereas *The People of the Territory of the Virgin Islands have for over a century evolved with a distinct cultural identity which is the essence of a Virgin Islander;*

Acknowledging *that our society is based upon certain moral, spiritual and democratic values including a belief in God, the dignity of the human person, the freedom of the individual and respect for fundamental human rights and freedoms and the rule of law;*

Mindful *that we have expressed a desire for our Constitution to reflect who we are as a People and a country and our quest for social justice, economic empowerment and political advancement;*

Recognizing *that as a People we have a free and independent spirit, and have developed ourselves and our country based on qualities of honesty, integrity, mutual respect, self-reliance and the ownership of the land engendering a strong sense of belonging to and kinship with these 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 connectivity and bond with these islands;*

Accepting *that the Virgin Islands should be governed based on adherence to well established democratic principles and institutions;*

Affirming *that we have generally expressed our desire to become a self-governing people and to exercise the highest degree of control over the affairs of our country at this stage of its development; 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.

NOW THEREFORE Her Majesty, by virtue and in exercise of the power vested in Her by Section 5 of the West Indies Act 1962 (a) and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows: - etc.

The Language of the Constitution

10.17 The view was expressed by some persons, including Miss Eugenia O'Neal and Mr. Jamal Smith, that the language used in the present Constitution, which is usual for most constitutions of the 'British' model, including the constitutions of independent countries of the Caribbean, is too legalistic and convoluted, making the document difficult for most persons to read and understand. It can also be said that the language of the draftsman discourages persons, other than lawyers, from reading and studying the document. In keeping with what we perceive to be a modern trend in drafting constitutional documents, the Commission favours, as much as is possible, the use of more 'conventional', as opposed to 'legalistic' English, in the drafting of the new Constitution, so as to make it more 'reader friendly'. We so **recommend.** In so recommending, we recognize that by its very nature, a Constitution is a legal document and must address the kind of matters usual to such a primary law, in precise and tested language.

The Governor

10.18 In addition to the matters addressed in our treatment of Issue No.6 in Chapter 8, there are three other matters which have been raised with the Commission concerning the constitutional provisions relating to the Governor, that merit consideration.

The first, relates to the manner or process by which governors are selected and appointed to represent Her Majesty in Her Government of the Virgin Islands.

The second, is whether at this stage of the Territory's development, and mindful of the recommendations made in Chapter 8 for the transfer of responsibility for the Public Service and Internal Security including the Police, from the Governor to a new regime, and in Chapter 9 for a Cabinet system to replace the Executive Council, the designation

"Governor" ought to be removed from the Constitution and replaced with some other appropriate "title" indicative of Her Majesty's Representative in the Virgin Islands.

The third, relates to the proviso to section 3(2) of the Constitution, which provides that certain actions by the Governor cannot be inquired into in any court.

(a) Selection of Governors

10.19 The first issue is not a new one. It has been raised in other quarters by the current Leader of the Opposition when he occupied the office of Chief Minister. The Honourable Member put it this way at the Mass Meeting in Road Town: *"A new Constitution should also make provision for the Chief Minister of the Territory to have an input in the selection of the Governor."* He buttressed his remarks by reading an excerpt from a letter received, as the then Chief Minister, from Baroness Amos, the then Under Secretary of State for the Territories, regarding the process for selection of "governor". We understand this matter has also been discussed by the Heads of Government of the Caribbean Overseas Territories, *inter se*, and at their meetings with representatives of the Foreign and Commonwealth Office. We also understand from Minister Rammell that a process of consultation with the Chief Minister is currently being applied.

10.20 The Commission recognizes that essentially this is a matter for negotiation between the Government of the United Kingdom and its Overseas Territories. However, the Commission considers that in today's world, such an important appointment ought, in the very least, to be made after consultation with the Chief Minister as to a short list of the persons being considered for appointment under section 3(1) of the Constitution, and we so **recommend**. The Commission also **recommends** that any change from the present position ought to be reflected in a new Constitution.

(b) Whether the title "Governor" would still be appropriate

10.21 As to the second of the issues posed regarding the office of Governor, several matters are considered pertinent. Full British citizenship has been offered to those who held British Overseas Territories Citizenship, and many persons in the Virgin Islands are now British Citizens. In that sense, it may not sit well conceptually to have a person designated

"Governor" presiding over a country of British Citizens. Under the present Constitution the Governor in essence has two roles, one as Her Majesty's representative and the other as the UK Government's representative in and for the Territory. However, if the changes recommended in relation to the Governor's areas of special responsibility are given effect to, certain significant portfolios of Government business would no longer be under the direct responsibility of a Governor. The role of a Governor would also be lessened where the recommendations for a Cabinet System are accepted and implemented. Hence, the role of "Governor" under the Constitution as a 'Minister' of government with specific portfolios, would be of less relevance under a new Constitution. This is in keeping with the stated 'policy' of Britain in wanting its Overseas Territories *"to enjoy a high degree of autonomy."* However, Her Majesty's position as the Executive Authority of the Virgin Islands, and the interest of the United Kingdom's Government in ensuring good governance and avoiding contingent liabilities, require that the UK Government continue to be represented in the Cabinet. It has been suggested to the Commission, that such a representative ought to be styled "the Resident" (who will be distinct from "the Governor" as Her Majesty's representative) to accord with the status of such office under a new Constitution. We so **recommend.**

(c) Certain actions by the Governor cannot be inquired into in a Court of Law

10.22 The third issue posed was raised by the Leader of the Opposition and by a few other persons during our public consultations. It was stated that certain actions by a Governor, such as fraud or mal-administration, ought not to be exempt from scrutiny by court action. It was also stated that since both the Governor and Ministers are constitutionally responsible for the administration of the Government, it is not justifiable to have the actions of the former exempt, while those of the latter group can be inquired into in a court of law.

10.23 However, a close examination of the proviso to section 3(2) reveals, that the exemption accorded to the Governor from scrutiny by the courts, is not a 'blanket' one, but is limited to whether he has "complied with" such instructions as *"Her Majesty may from time to time see fit to give him."* The proviso does not extend to the exercise of the Governor's powers and duties conferred or imposed on him by the Constitution, by any other law, or such other powers as Her Majesty may assign to him from time to time (section 3(2)). It is only 'instructions' as to the exercise of those powers, given to the Governor by Her

Majesty, that cannot be inquired into in any court. This accords with constitutional theory where the actions of the sovereign cannot be inquired into in any court. Accordingly, we decline to recommend any change to the proviso to section 3(2).

Deputy Governor

10.24 The Functions of the Deputy Governor are set out in section 5A of the Constitution. Having considered these provisions in light of the recommendations made in this Report regarding the reduced role of the Governor, the Commission does not consider it necessary to recommend any changes to section 5A.

Disposal of Crown Lands

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 authorized by him in that behalf by writing under his hand..."* In their Position Paper, Members of the Legislative Council recommended that Crown lands be administered by a Minister responsible to the Cabinet and their disposition should no longer require the signature of the Governor. The Commission is not in full agreement with this recommendation.

10.26 It is to be noted immediately that section 8 does not provide for the administration of Crown lands by the Governor. In fact such matters, as we understand it, fall under the purview of the Ministry of Natural Resources and Labour and hence, the sitting Minister. This is in keeping with the assignment of responsibilities or portfolios pursuant to section 18(1), when an elected Member is appointed to head that Ministry. The Commission agrees with this practice, and **recommends** that the Constitution expressly provides for the appropriate Minister and Ministry to continue to have responsibility for administering all Crown lands.

10.27 As regards the power to dispose of Crown property (whether by sale, lease or otherwise), it is the Commission's view, and we **recommend,** that the Constitution provide for all dispositions or grants of Crown lands to require prior Cabinet approval (which, as we understand it, is the current practice relative to Executive Council). However, because of the legal status of the ownership of such properties being vested in the Crown by and through Her Majesty, the actual execution of any disposition or grant must either be done by Her Majesty's Representative or by the responsible Minister under and by virtue of the written delegated authority of Her Majesty's Representative. We so **recommend.**

Prerogative of Mercy and the Mercy Committee

10.28 Section 11 provides for a Mercy Committee, which is advisory to the Governor regarding the exercise by him of the Prerogative of Mercy under section 10. It includes the power, in Her Majesty's name and on Her Majesty's behalf, to issue pardons and respites to convicted persons, to substitute a less severe sentence and to remit the whole or part of a sentence. The Governor, while obliged to consult with the Mercy Committee, is not required to accept their advice, and must exercise such powers "in his own deliberate judgment." Also, only the Governor can summon, and he chairs, meetings of the Mercy Committee. The Commission has received no recommendations for these provisions to be changed.

10.29 However, the focus by some persons has been on the composition of the Mercy Committee itself, and the fact that the Committee cannot deliberate unless the Attorney General is present (section 11(3)). It was felt that since the Attorney General is constitutionally responsible for criminal prosecutions, he ought not to sit on the Mercy Committee to advise on pardons etc. We note that the Bermuda Constitution does not require the Attorney General to be a member of their 'Advisory Committee on the Prerogative of Mercy.'(section 23). However, the Commission does not consider the presence of the Attorney General (the chief prosecutor) on the Mercy Committee, to be a "conflict of interest", as some have contended. All salient factors relative to the crime for which the person has been convicted, are relevant matters for consideration by the Mercy Committee. The Attorney General's presence there can be of much assistance to the other members, including the Governor. In any event, in light of the Commission's recommendation regarding Issue No.1 (the creation of the constitutional office of DPP), there can now be no issue regarding the Attorney General's continued membership of the

Mercy Committee. Regarding the membership of the "Chief Medical Officer", that post has been changed to the Director of Health Services, and the public health services of the Territory, as of 1st March 2005, transferred under the management of a statutory body. Section 11(1) of the Constitution would therefore have to be amended to replace "Chief Medical Officer" with "Director of Health Services" or some other appropriate designation. We so **recommend**.

Changing Chief Minister to Premier

10.30 It has been suggested by the Members of the Legislative Council that in light of their recommended constitutional advances such as the replacement of the Executive Council with a Cabinet System, with a Cabinet Secretary, and the transfer of certain of the Governor's special responsibilities to a Minister, the designation of the head of government ought to be changed from "Chief Minister" to "Premier".

10.31 The designation "Premier" was used to refer to the head of government under the former "Associated Statehood", which many of the former British Caribbean territories enjoyed prior to taking independence. It is also the designation of the head of government in Bermuda which has had a cabinet system since 1968.

10.32 In the event that the Commission's recommendations for a Cabinet system and for transferring responsibility for the Public Service and the Police from the Governor, are accepted and implemented, it is our view that the change in designation to "Premier" which accords a higher status internationally, ought to be effected, and we so **recommend.**

Absence of Ministers from the Territory

10.33 Section 16(3)(e) of the Constitution stipulates that the Chief Minister shall vacate office if he is absent from the Virgin Islands, without *"having given the Governor prior notice of such absence."* The Commission appreciates that for the proper functioning of Government, it is important that Her Majesty' Representative in the Virgin Islands is made aware of absences from the Territory by the Chief Minister, and how he can be contacted, especially in circumstances of emergency or natural disaster. However, we

consider that the Constitution ought not to provide for the automatic vacation of the office of Chief Minister by the holder, in circumstances where notification was not given, whether through inadvertence or otherwise. Sub-paragraph (e) also provides for a Minister, other than the Chief Minister, to vacate his seat if absent from the Territory, without the prior written permission of the Governor acting in accordance with the advise of the Chief Minister.

10.34 It is to be noted that there is no such provisions in the constitutions of Anguilla or Bermuda, for example. Accordingly, it is the Commission's **recommendation** that section 16(3)(e) be removed from the Constitution altogether.

10.35 A further issue arises in relation to section 17(1) of the Constitution, where the Chief Minister is likely to be absent from the Territory for more than forty-eight hours. This sub-section provides for the Governor, "*by notice published in the Gazette*", to authorize the Deputy Chief Minister to "*perform the functions conferred on the Chief Minister*" under the Constitution. It must be noted that this is not an acting appointment as Chief Minister, as is the case under section 5(1) where the Deputy Governor may be appointed to act in the office of Governor, in circumstances where either such office is vacant or the Governor is absent from the Virgin Islands (except for a short duration), or is for any reason unable to perform the functions of his office. It is also to be noted that the process of authorizing the Deputy Chief Minister to perform the Chief Minister's functions, is by way of notice published in the Gazette, which is published intermittently at best, and usually requires a special issue for such matters.

10.36 This issue was raised with the Commission by the Attorney General, who posed three questions: First, whether the time had not come for the Constitution to provide for the Deputy Chief Minister to be appointed to act as Chief Minister, whenever the latter is absent from the Territory for more than forty-eight hours; or, secondly, whether, having regard to the technological communications age in which we live, section 17(1) should not be repealed in its entirety, as the Chief Minister would be able to run the affairs of the Government from anywhere in the world; or, thirdly, if section 17(1) is to be maintained, whether the requirement for publication of the notice in the Gazette ought not to be removed. On this issue, the Members of the Legislature, in their Position Paper, have recommended adoption of the first of these options

10.37 It is the Commission's view that the requirement for publication in the Gazette in order

to give constitutional effect to the assignment of the Chief Minister's functions to the Deputy, is antiquated, unnecessary in the Virgin Islands of today, and ought to be removed. Likewise, we see no good reason why the Deputy Chief Minister should not automatically be appointed to act as Chief Minister, when the latter is to be absent from the Territory for more than a short period. On the other hand, while the Commission considers the second option an interesting one, (after all when the President of the United States is absent from the Union for extended periods, their constitution does not provide for the Vice President to act as, or perform the functions of, President; and similarly in Britain when the Prime Minister is absent), we are in agreement with the first option posited by the Attorney General and supported by the Members of the Legislative Council. Accordingly, it is our **recommendation** that section 17(1) be redrafted to provide for the Deputy Chief Minister to automatically act as Chief Minister in circumstances where the latter is to be absent from the Territory for a period in excess of forty-eight hours; and for the requirement for notice of such appointment to be published in the Gazette to be removed. Where both the Chief Minister and his Deputy are absent from the Territory at the same time for more than fort-eight hours, the Constitution should provide for another Minister, designated by the Chief Minister, to be appointed to act as Chief Minister and to perform the functions of that office. In each instance, any such appointment or assumption of office should automatically cease upon the return to the Territory of the Chief Minister, unless he is incapacitated and cannot perform the functions of office.

Assignment to Ministers of responsibility for the administration of departments

10.38 The meaning and application of the words *"including responsibility for the administration of any department of government"* used in section 18(1) of the Constitution, has come up for much discussion both amongst the Commissioners and at public meetings. It has been raised specifically by the Attorney General for consideration by the Commission. These words appear in the instrument of appointment of all Ministers, as far as we have been able to ascertain. Likewise, the exact words are to be found in section 27(1) of the Constitution of Anguilla and section 61(1)(a) of the Constitution of Bermuda.

10.39 There appears to be some 'difference of opinion' within Government as to the correct meaning and effect of those words in section 18(1) and, most importantly, as to the 'role'

of Ministers vis-à-vis the Permanent Secretaries and Heads of Department as it relates to matters administrative, as distinct from matters of policy. Is a Minister imbued, in addition to his responsibility for particular subject areas of the Government, with administrative authority over the running of the departments of Government falling within the assigned portfolios? Or should a Minister function simply as the political head of the Ministry, with responsibility for seeing to the setting and implementation of policy decisions taken at the level of Executive Council?

10.40 It must be borne in mind that Ministers, in taking-up their assigned portfolios, assume the responsibility, and will be held by their fellow Ministers, the other members of the Legislative Council and the public at large, accountable for the discharge of those responsibilities and may, in certain circumstances, be called upon to resign or be removed from office for what may be viewed as mismanagement of one or more of his portfolios. Likewise, a Minister's ability to implement the policies of Government (and of his party), is directly related to the functioning of the departments of Government falling under his Ministry, and the proper and effective management of those departments and their key personnel. On the other hand, a Minister cannot be expected, and it ought not to be his role, to be involved in the day to day administration of the departments falling under his subjects of ministerial responsibility.

10.41 It is not the role of the Commission to interpret provisions of the Constitution. This is the role of the courts. However, it seems to the Commission that section 18(1) is quite clear; there is no real ambiguity. It provides for the Governor to assign to a Minister, in addition to responsibility for the "conduct of any business of the government", responsibility for the administration of any department falling under his portfolio. This would, in our view, entitle Ministers to not only issue policy directives to Permanent Secretaries and Heads of Departments, but to also give general, and in appropriate cases, specific administrative directives as to the manner in which any department falling under his portfolio is to be managed, subject at all times to matters prescribed by applicable law or by internal regulations. We emphasize that the day to day management of departments of government must fall to the Department Heads, with oversight by the Permanent Secretary, who is expected to communicate to the Heads matters of policy approved by the Cabinet, and significant administrative directives given by the Minister for the more efficient running of the department and delivery of services to the general public. Accordingly, we do not see the need to recommend any change to section 18(1).

British Subject and British Dependant Territories Citizen

10.42 The term "British Subject" is either obsolete or inapplicable to the Virgin Islands. It went out with the British Nationality Act 1981 as a class of citizenship. It was replaced with "British Dependent Territories Citizen" and this designation subsequently changed to "British Overseas Territories Citizen" ("BOTC"). However, notwithstanding subsequent amendments to the Constitution, the term "British Subject" remains in a few provisions, most notably, section 28 dealing with the qualifications for elected membership of the Legislative Council, and section 31 dealing with the qualifications for voters.

10.43 These sections need to be brought in line with the current law and nomenclature regarding citizenship. Alternatively, the requirement for one to have that class of British citizenship, as one of the qualifications for elected membership and also for voting, ought to be removed altogether. We so **recommend**.

10.44 As regards the qualifications for elected membership of the Legislative Council, this has been addressed in the main in the Commission's treatment of Issue No. 3 in Chapter 5. The recommendations in relation to this Issue, if accepted, will result in substantial changes to section 28, including deletion of the term "British Subject" from qualification (a).

10.45 As regards the qualification for registration as a voter under section 31(1), Members of the Legislative Council recommended in their Position Paper, the deletion of the term "British Subject". The Commission is in agreement and so **recommends**. Honourable Members go on to suggest that subsection (1) should read-

"Subject to the provisions of subsection (2) of this section, 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 is deemed to belong to the Virgin Islands and that person may be a British Overseas Territories Citizen or may not be a British Overseas Territories Citizen, and on the qualifying date has attained the age of eighteen years."

10.46 This draft provision seeks to remove the requirement of British citizenship as a qualification for registration as a voter for the purpose of General Elections, since, in the wording, the holding of British Overseas Territories Citizenship is put in the alternative, and not made a mandatory requirement. In doing so, there seems to the Commission to be

no useful purpose in referring at all to BOTC in the statement of qualifications, and, it is the Commission's view that any reference to such citizenship can safely be omitted altogether.

10.47 As presently stated, two kinds of 'status', one under local law and the other under Imperial legislation, is required to qualify to be registered as a voter. Thus, being deemed to belong is not sufficient, one must also have British citizenship. However, it must be remembered that many persons qualifying for registration as voters in the Territory, are now also full "British Citizens." It is the Commission's view, that the only status for eligibility to be registered to vote should be that provided under section 2(2) of the Constitution, that is, Belonger status. We so **recommend**. For the avoidance of doubt, the other qualifications in section 31(1) ought to remain.

Disqualification for Elected Membership

(a) Swearing Allegiance, Obedience or Adherence to a Foreign Power

10.48 Section 29 of the Constitution lists the disqualifications for elected membership of the Legislative Council. Only one such disqualification has been raised in the Review for scrutiny and recommended change. This is the first listed disqualification- *"who is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state."* An identical provision is to be found in the constitutions of Anguilla, Montserrat, Bermuda and the Cayman Islands.

10.49 This disqualification is most relevant in the context of the Virgin Islands, as a not insignificant number of Virgin Islanders or Belongers by birth, have migrated to either the U.S. Virgin Islands or mainland United States, usually in order to better themselves or to afford their children better educational opportunities. Many such persons and their offspring have become naturalized U.S. Citizens, a status most of them wish to retain. However, under the present provision, they would not be qualified to hold elected membership in the Council should they return to live in the Virgin Islands, unless they renounce their U.S. Citizenship. Indeed, some of our politicians and representatives have had to do just that. The question as to the disqualification of certain candidates for election on this ground, has at times attracted much comment both on the campaign trail and elsewhere.

10.50 The view has been expressed to the Commission that this disqualification is unfair to these Virgin Islanders who have returned to live in their country of birth and wish to make a contribution to the continued development and prosperity of these Virgin Islands through elected public office. It is to be noted in this context, that the disqualification does not apply to persons who are U.S Citizens by birth and Belongers by descent. Furthermore, by taking on U.S. Citizenship one is not relinquishing Belonger status, as it is not a 'citizenship' and, in any event, the United States permits dual nationality.

10.51 The Commission finds these points persuasive. Our people must be free to return home and to exercise the important democratic right of contesting for election to the highest law making body in the land, regardless of what citizenship they have acquired. Additionally, this disqualification, denies the Territory a potential source of competent leadership. Accordingly, the Commission **recommends** the deletion of sub-paragraph (a) as a disqualification for elected membership under section 29.

(b) Time for making challenge of disqualification

10.52 Another related issue, and one raised to the Commission by the Attorney General, concerns the 'timing' under the Constitution for challenging a person as being disqualified for elected membership. The Constitution does not expressly provide for such a challenge to be made 'before' the person has been elected following a General Election.

10.53 Section 49(1)(a) gives the High Court jurisdiction to hear any question as to whether "*any person has been validly elected as a member of the Legislative Council.*" This permits a challenge only when the election has taken place. It does not permit a challenge before the court when the person is being nominated to contest an election, or thereafter and before the election is held. The view has been expressed to the Commission that the Constitution ought to expressly sanction an earlier challenge, and for the court to have jurisdiction to deal with such matters when the person is being nominated.

10.54 This position is so regardless of the disqualifying ground alleged, for example, where the person is known to be certified as being of unsound mind, has been adjudged or declared a bankrupt, or was convicted of an offence connected with elections. Should the Constitution not provide for the nominating officer, where he or she is aware of such

circumstances being applicable to a person being nominated, to be authorized to refuse the nomination papers, subject to such refusal being challenged in a court of law? This would avoid the added costs of having to hold a by-election, in circumstances where a post election challenge has been upheld by the court. There is certainly some merit in these recommendations. However, the Commission considers that the vesting of such authority in a nomination officer can lead to abuse, confusion, uncertainty and disruption of the electoral process. Accordingly, we decline to make any such recommendations.

Members Vacating their seats at next dissolution of the Council after their election

10.55 Section 30(1) of the Constitution stipulates that every elected Member must vacate their seat at the next dissolution of the Council after his election. However, a Member, who is a Minister of Government, does not vacate such office upon dissolution of the Legislature, but continues in office unless he is not elected when the Council first meets after a General Election (section 16(3) (a) & (b)). Also, provision is made for the filling of any vacancy in the office of Minister between dissolution and the next General Election, by a person elected immediately before the dissolution being appointed a Minister, as if he were still a member of the Council (section 15(4)). These sub-sections provide, most importantly, for continuity in administering the government after dissolution of the Legislature, until a new government is sworn in after a General Election.

10.56 Should the same rule apply to members who are not Ministers of Government? Honourable Members so recommend in their Position Paper. They see this as an inconsistency which needs to be corrected. Members of the Legislative Council recommend that every elected member should retain his seat beyond dissolution of the Council, and "*until after the counting of the votes on election day whereby it will have been determined who is elected and who is not*". During that period, the Members of the Legislative Council will retain all the rights and privileges of membership of the Legislature.

10.57 Similar provisions to what currently appertains in the Constitution, are in the constitutions of most of the BOTs, including Anguilla and Bermuda. The recommendation by Members of the Legislative Council is akin to what prevails under the U.S. system, where members of the Congress or the legislature, as the case may be,

remain in office until they fail at the polls, unless they opt not to seek re-election. On the other hand, under the Westminster system of parliamentary democracy, on which the Constitution of the Virgin Islands is modeled, a member of the Parliament or the legislature, as the case may be, is required to vacate office upon dissolution thereof, while ministerial responsibility and authority continues until the results of the elections are known. Constitutionally, the period between dissolution of the Council and when elections must be held, cannot exceed two months.

10.58 The Commission can find no compelling reason to depart from the existing constitutional arrangements. Once the Council has been dissolved, the authority of the Members of the Legislative Council cease, as the Council is *functus* and can no longer transact legislative business.

Procedure for deciding Exemption of Member from vacating his Seat

10.59 Section 30(2)(e) requires a member who becomes a party to any contract with the Government of the Virgin Islands, to vacate his seat in the Council. There is good reason for such a preemptory provision. It is to prevent 'conflicts of interests' or the appearance of such conflicts, and is considered an important aspect of good governance.

10.60 The issue which has been raised by the Leader of the Opposition, does not concern this ouster provision or the proviso permitting an exemption to be requested and granted by the Legislative Council. The Commission is aware that exemptions have been requested by and granted to certain Members of Council. Rather, his recommendation to the Commission is for the matter of an exemption requested to be the subject of a Motion and open debate on the floor of the Legislature. We are told that what currently pertains, is for the request to be dealt with *in camera* by Members and either granted or not.

10.61 The proviso to sub-paragraph (e) requires "the Council" to decide on the request for an exemption. It does not prescribe for such matters to be dealt with in private. A negative decision on such a request, is subject to an appeal by the Member to the High Court pursuant to sub-section (4). This immediately raises issues concerning the separation of powers and the authority of the Legislature to regulate its own affairs, matters which the Commission is not required to address in this Report.

10.62 The matter of a sitting Legislator having to vacate his seat or being considered for an exemption from the strict requirement of the Constitution, does not seem to be the kind of matter which ought to be decided away from public view and scrutiny. Moreover, the relevant provision requires such a decision to be made by the "Council", which suggests during an 'open' session. After all, the public has a right to know what is the nature and basic terms of the contract which the Legislator has or is to have with the Government, the reasons for the request for an exemption, the views thereon expressed by other Members of the Legislative Council, and the way in which each Legislator voted on such an important matter as an elected member being liable to vacate his seat. This approach becomes even more important in an era where openness and transparency are the guiding principles of democratic government. We therefore find the point made by the Leader of the Opposition persuasive. Accordingly, it is the **recommendation** of the Commission that the proviso to section 30(2)(e) of the Constitution be amended to stipulate, or to put it beyond doubt, that requests by a Member of the Legislative Council for exemption from having to vacate his seat, must be made by way of Motion, placed on the Order Paper and debated at the next sitting of the Legislative Council.

Quorum of the Council

10.63 Members of the Legislative Council have recommended that the quorum for meetings of the Legislative Council be changed from five to seven having regard to the current membership of the Council of thirteen elected members. However, this change to section 40(1) of the Constitution was made by virtue of the Virgin Islands (Constitution) (Amendment) Order 1994 (No. 1638).

Office of the Legislature as Autonomous Body

10.64 This is the recommendation of Members of the Legislative Council in their Position Paper. The rationale and justification has been detailed in a "Restricted" internal memorandum accompanying the Paper, for the benefit of the Commission. As presently constituted, the Office of the Legislative Council operates as a department under the Deputy Governor's Group. The functions of the Deputy Governor are set out at section 5A, inserted in the Constitution in 2000. Neither the Governor nor the Deputy Governor are members of the Legislative Council, and no specific duty or function in relation to the Legislative Council, other than as provided in sections 46 and 47 of the Constitution in

relation to the Governor, is assigned by the Constitution to either office. However, the Office of the Legislative Council is staffed by members of the Public Service and, accordingly, falls to be dealt with by the Governor, and by delegation, the Deputy Governor, under sections 9 and 52 (power to constitute and make appointments to public offices and to discipline such persons) and section 19(d) (the governor's responsibility for the terms and conditions of service of persons holding or acting in public offices) of the Constitution.

10.65 As such, the Office has to deal with the Human Resources Department and the Public Service Commission concerning matters of staffing, a process which it is said is not efficient and can be rather lengthy. Added to this, the Office usually operates under certain stringent time constraints imposed by the Standing Orders of the Legislative Council. These require staff to routinely work unconventional hours and with extended overtime periods. Accordingly, it is said that being an autonomous body or commission will eliminate the inefficiencies with respect to staffing and accounting, without compromising standards. Members therefore, call for the establishment of the Office as a body separate from the Public Service, as an independent commission or statutory board, as is the case in Barbados, where the Management Commission of Parliament is a body corporate. The view is expressed that this can be seen as a means of giving effect to the 'doctrine of separation of powers'.

10.66 The Commission is certainly attracted to this proposal. As we progress as a country towards self-determination, it is imperative for there to be a strengthening of our democratic institutions, especially the three branches of government, while at the same time giving effect to their separate roles. Any well thought out and tested initiative is therefore worthy of due consideration. However, we note that a matter of such importance as this was not one of the specific Terms of Reference to be considered by the Commission and was not a matter raised at our public meetings. While the Commission has not had the benefit of the relevant law in Barbados establishing their Management Commission of Parliament as an independent body corporate, we are satisfied that the direction adopted by the Members of the Legislative Council ought to be given further consideration and, in so doing, the Commission also recognizes that it is up to the Members of the Legislative Council to initiate the steps, including appropriate legislation, and constitutional change as may be necessary, to give effect to their stated intention.

Emergency Powers

10.67 The Constitution does not address the declaration of a State of Emergency. This is, in our view, a glaring omission which must be rectified with a new Constitution. The only local statute is the Emergency Powers (Disasters) Act Chapter 239, which is at variance with imperial legislation namely the Virgin Islands (Emergency Powers) Order 1967, which confers upon the Governor the power, during a period of emergency, to make laws "as appear to him 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." The Governor has the power by proclamation to declare that a public emergency exists or no longer exists in the Virgin Islands, and in so doing he is not obliged to consult with the Executive Council but merely to consult with the Chief Minister unless, in his judgment, it may be impractical to do so. Likewise, the Constitution of Anguilla specifically authorizes the Governor, by proclamation published in the Gazette, to declare a State of Emergency, and to revoke such declaration. The declaration will expire in 90 days, unless previously revoked (section 17). Section 14 of the Bermuda Constitution authorizes the Governor by proclamation to declare a state of emergency. The proclamation must be laid before both Houses "as soon as practicable." A proclamation will expire in 14 days, unless sooner revoked by the Governor or extended by resolution of each House for a period which cannot exceed 3 months from the date it would have expired.

10.68 The ability to declare a State of Emergency in appropriate circumstances, is an important function of government and one which the Commission considers ought to be included in the new Constitution at the end of the chapter on fundamental rights and freedoms, as is usually the case. We so **recommend**. The Commission also **recommends** that provision be made for declarations of a State of Emergency to be made by the Cabinet, after consultation with the Governor (or Her Majesty's Representative), in the Virgin Islands, such declarations to be laid before the Legislative Council and to expire within 14 days, unless extended by an affirmative vote of the Council for a period not exceeding three months from the date on which it would have expired.

The Courts and the Judiciary

10.69 The Judiciary is the Third Branch of Government. However, there is no provision in the Constitution which speaks to the Courts or the Judiciary. The Commission views this as another omission which ought to be rectified in a new Constitution. We so **recommend.**

10.70 The Virgin Islands does not have its own Court System. It is a member country of the Eastern Caribbean Supreme Court. The jurisdiction of that court is set out in the West Indies Associates States (Supreme Court) Act 1967. The Act provides for a High Court and Court of Appeal. The former is a resident court and the latter itinerant. Appeals from decisions of the Court of Appeal are to the Privy Council. Consideration is presently being given to establishing a commercial court or a commercial division of the Eastern Caribbean Supreme Court in the Virgin Islands. Consideration is also being given by the present Government to establishing a separate court system for the Territory. Any of these options will have significant implications for the Territory as a Financial Services jurisdiction. There is also consideration being given, at the level of the Supreme Court, to bringing all Magistrate's Courts in the OECS, which are all creatures of local statute, under the umbrella of the Eastern Caribbean Supreme Court.

10.71 Whatever the decision locally, whether to establish a separate Court system with its own judiciary for the Virgin Islands or to establish a stand-alone Commercial Court, or to remain a part of the Eastern Caribbean Supreme Court system, the Constitution ought to reflect that existing court system in specific provisions. We so **recommend**.

Constitutional Advancement and the Question of Independence

10.72 The Commission has not detected any ground-swell of support for the Territory becoming an independent nation. Quite frankly, the word "independence" was hardly mentioned during the public consultations and usually, either to make the point that there is no real support for such a move on the Territory's part at this stage or to indicate that it makes good sense to embark upon the process of preparing for such status, if it is opted for at some future date. Many persons where of the view that the Territory ought to be moving towards self-determination, and this Review was seen by some as an important step in that direction. Others, who represented a minority, were very skeptical or ambivalent, feeling that the exercise was either a waste of time as Britain will not agree to any substantial constitutional advancement for the Territory, while others felt we should not bother unless and until, as a people, we decide to take the ultimate step and

become an independent state.

10.73 It is the Commission's view, and seemingly that of our elected representatives, that the time has come for there to be some significant constitutional advancement for the Territory short of independence. 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 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.

10.74 At the same time, the Commission recognizes that, as a country, we have passively chosen to remain under the umbrella of Britain and to retain ultimate authority for the Virgin Islands with Her Majesty and the Government of the United Kingdom. This continuation of our subordinate status, will necessitate the maintenance of certain over-arching provisions in our Constitution, for example, section 71, whereby Her Majesty retains *"full power to make laws for the peace, order and good government"* of the Territory. This relationship, described in the White Paper as a 'modern partnership', also gives rise to international obligations on the part of Britain for the Territory. These obligations must be respected in the context of that constitutional relationship and, in doing so, there must exist a climate of mutual respect for each other's rights and obligations and for the aspirations of the people of these islands, all of which are so eloquently spoken to in the White Paper.

National Symbols

10.75 The Commission wholeheartedly agrees with those who point out that an important part of nation building is the adoption of certain national symbols, which speak to who we are as the 'Virgin Islands', and the principles and ideals which are dear to us as a people and

a country. Some such symbols like a national motto, national flower, national bird and national dish, to name a few, have already been adopted. It may not be feasible at this stage of our constitutional status, to adopt or proclaim some of the key national symbols indicative of an independent nation, such as a national anthem and national flag, although we do have our own national song and a 'local' flag. As the country moves forward towards self-determination, there ought to be an organized campaign to involve native Virgin Islanders in designing and formulating such national symbols. We so **recommend.**

Change from Legislative Council to House of Assembly

10.76 The change from 'Legislative Council' to 'House of Assembly', as has been effected in Anguilla, was recommended by one contributor to the Review and the terminology used by another, perhaps through inadvertence. The legislative body in most Caribbean independent states is constitutionally referred to as the 'House of Assembly.' That designation has also been adopted in Bermuda since 1967 when they received a pre-independence constitution. The change would perhaps be more than just one of nomenclature, especially if there is some significant advancement achieved as a result of this exercise. Accordingly, the Commission would **recommend** its adoption where such advancements, as recommended in this Report, have been accepted and implemented.

Public Debt

10.77 The Auditor recommended that section 64 of the Constitution be amended to provide for the payments on the Public Debt to be made from the 'Debt Service Fund', which is a fund introduced by the Ministry of Finance in the Financial Statements. At present, section 64 provides for the Public Debt to be a charge against the Consolidated Fund. As we understand the reasoning, the Public Debt is currently being serviced from the Debt Service Fund which has no particular legal status. Accordingly, we agree with the Auditor and **recommend** the amendment of section 64(1) to provide for the Public Debt to also be a charge on the Debt Service Fund, which should likewise be given constitutional recognition.

Pension Fund

10.78 The Auditor has also pointed out that the present government is in the process of establishing a 'Pension Fund', to meet the pension disbursement demands for retired public servants. She has similarly advised that section 57 of the Constitution, which provides for "awards" granted under any law in force in the Virgin Islands to be charged and paid out of the Consolidated Fund, be amended to enable such awards to also be paid from the 'Pension Fund', when established. We so **recommend.**

Tabling of the Annual Audit Report

10.79 Section 66(3) of the Constitution requires the Annual Audit Report to be submitted by the Auditor to the Minister of Finance who *"shall cause it to be laid before the Legislative Council"*. There is no stipulation as to the period within which the report ought to be tabled. We are informed that delays of several months have been experienced. The Auditor has accordingly recommended, that this section of the Constitution be amended to require the Annual Report to be submitted by the Auditor General directly to the Speaker of the Legislative Council for tabling at the Council at the next sitting thereof, as is the case under the Anguilla Constitution.

10.80 The Commission sees the function of the Auditor under section 66 of the Constitution as one of the most important constitutional oversights on the operations of Government and, hence, one which must be strengthened where required. The Annual Report is the primary reporting mechanism to the Legislature, and to the Territory, on how government has been functioning and, most importantly, how public revenues have been spent during the applicable period. Any process which results in significant delay in the tabling of the Annual Report must be rectified. Accordingly, we adopt the position taken by the Auditor summarized above and so **recommend,** with the further **recommendation** that the Annual Report should also be submitted to the Minister of Finance at the same time as it is sent to the Speaker.

Auditor General

10.81 Finally, section 66(1) provides for there to be an "Auditor" whose office shall be a public

office. The Auditor has recommended that, for consistency, all references in the Constitution to the "Auditor" should be changed to "Auditor General" as the designation used in the Audit Act 2003. Section 66(1) and all other sections, must be made to conform with that nomenclature. We so **recommend**.

Schedule of Changes to the Draft Model Chapter on Fundamental Rights

Protection of Life

Article 2(2)(a)

- The Human Rights Reporting Coordinating Committee ("HRRCC") recommends that the words "for the defence of property" in square brackets not be retained.
- The Commission noted that this phrase is used in the relevant provision of the Bermuda Constitution and, on balance, favours its inclusion.
- The Commission favours the use of the expression "such force as is reasonably justifiable" instead of "which is no more than is absolutely necessary".

Article 2(2)(c)

- The Commission is of the view that this sub-paragraph dealing with the suppression of a riot, insurrection or mutiny should be retained.

Article 2(2)(d)

- The Commission is of the view that this sub-paragraph dealing with preventing the commission of a criminal offense should be retained.

Protection from Inhuman Treatment

Article 3

- The Commission agreed that this should be retained and that consideration ought to be given to the Convention against Torture and other Cruel Inhuman and Degrading Treatment and Punishment, and the definitions therein as advocated by the HRRCC.

Protection of the Right to Personal Liberty

Article 5(2)

- The Commission agrees with the opinion of the HRRCC that a person arrested should be also entitled to a phone call to their next of kin
- See also the recommendations at paragraph 7.13 – Articles 5(3), 5(4) and 5(5).

Protection of the Rights of Prisoners to Humane Treatment

Article 7

- The Commission agrees with the concerns of the HRRCC regarding the cost and availability of resources for the full implementation of these rights as regards unconvicted and juvenile prisoners, in particular. This is a matter which needs to be properly

addressed by the government as the country moves to incorporate these as fundamental rights.

Protection for Private and Family Life

Article 9

- The Commission agrees that this provision be retained, and that the word "private" needs to be defined to include both business and professional communications.

Protection of Freedom of Conscience

Article 11

- The Commission, having noted the impact this will have on Virgin Islands society and on schools as it relates to the saying of prayers, nonetheless agree that this provision be retained.

Protection of the Right to Education

Article 12(2)

- In view of its recommendation at paragraph 7.24, the Commission considers that this provision should be left out. It was noted that it is not in the Bermuda Constitution.

Protection from Deprivation of Property

- The Commission favours "Version A" in the Draft Model Chapter on Fundamental Rights and not "Version B" which was preferred by the HRRCC.

Article 15(1)

- The Commission favours retaining this provision but would substitute for sub-paragraph (a) of the Draft Model Chapter, sub-paragraphs (a) of Article 13(1) of the Bermuda Constitution modified to read as follows:

- However, a new sub-paragraph (d) should be added along the lines of Article 13(1)(d) of the Bermuda Constitution which reads: *giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.*

Article 15(2)

- The Commission is in favour of retaining this sub-paragraph.

Article 15(3)(a) & (b)

- The Commission is in favour of retaining these sub-paragraphs.

Article 15(4)

- The Commission is in favour of retaining this sub-paragraph.

Article 15(5)

- The Commission agreed with the HRRCC that this section is not necessary, because the Commission recommended the adoption of sub-paragraph (a) (with minor variations) of Article 13(1) of the Bermuda Constitution.

Protection from Discrimination

- The Commission preferred "Version A" of the Draft Model Chapter and not "Version B" as advised by the HRRCC.

Article 16 (3)

- However, the Commission was in favour of substituting sub-paragraph 3 in Version B (definition of "discriminatory") for sub-paragraph 3 in Version A.

Article 16(4)(b)

- The Commission agreed that this section should be retained.

Article 16(4)(c)

- The Commission is of the view that there needs to be a bit more clarity in this provision, but agreed that it is essential.

Article 16(4)(d)

- Members were in favour of incorporating as subparagraph (d), what is subparagraph (c) of section 13 (4) of the Anguilla Constitution as modified to read "*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.*"

Article 16(4)(d)

- The Commission is in favour of retaining this provision.

Articles 16(5),(6),& (7)

- The Commission agreed that these sub-paragraphs should be retained.

Article 16(8)

- The Commission agreed that this sub-paragraph should be left out.

Article 16(9)

- The Commission agreed that this sub-paragraph should be retained.

Derogations from Fundamental Rights and Freedoms Under Emergency Powers.

Article 17

- The Commission agreed that this provision should be retained, and the phrase "reasonably justifiable" should be used instead of "strictly required".

Protection of persons detained under emergency laws.

Article 18(1)(a)

- The Commission agreed that the provision in the Draft Model Chapter should be retained but the first two lines amended to read: *"he shall as soon as reasonably practicable and in any case not more than four days"*

Article 18(1)(b)

- The Commission was in favour of retaining this provision.

Article 18(1)(c)

- The Commission agreed that this sub-paragraph should be retained with the added words found in the comparable provision in the Anguilla Constitution – *"from among persons who are or have been judges of the High Court or the Court of Appeal or are qualified for appointment as such judges."*

Article 18(1)(d)

- The Commission agreed that this provision should be retained as in the Draft Model Chapter.

Article 18(1)(e)

- The Commission agreed that this provision should be retained.

Article 18(2) & (3)

- The Commission agreed that these provisions should be retained.

Enforcement of Protective Provisions

Article 19

Subsection 1 should be retained

Subsection 2 should be retained

Subparagraphs 3(a)(b) & (c) should be retained

Subsection 4 should be retained

Subsection 5 should be retained

Subsection 6 (a) The Commission was strongly of the view that this sub-paragraph should be deleted as the courts in the Virgin Islands, when considering constitutional matters including breaches of the fundamental rights and freedoms provisions, should not be restricted to considering precedents from the courts and bodies listed in section 19(6), but should be free, as it is today, to consider authoritative decisions of other courts including Canadian, Australian, Indian, South African and the Supreme Court of the United States. This conforms with the views expressed to the Commission by the Attorney General.

Subparagraphs 6 (b) & (c) should be retained

Subsection 7 – This sub-section should be retained. However, the proviso is too restrictive and this is not desirable. Where a person's application is dismissed because it is deemed by the High Court to be frivolous or vexatious, that person should at least be entitled to seek leave to appeal to the Court of Appeal from that decision.

Subsections 8 and 9 should be retained.

Proceedings which might affect Freedom of Conscience

Article 20

- It was determined that this section should be retained.

Proceedings which might affect Freedom of Expression

Article 21

- Subsection 1 should be retained
- Subsection 2 should be deleted and left up to rules of the court.
- Subsection 3 should be retained.
- Subsection 4 should, on balance, should be retained.

Article 22

- This provision dealing with the definition of certain terms should be retained.

Summary of Recommendations

Issue No. 1 – Separation of the Duties of Attorney General

(1) The complete separation of the prosecutorial functions of the Attorney General and the reposing of these functions in a Director of Public Prosecutions established as an office under the Constitution, with the same constitutional protection afforded by sub-sections 3 and 5 of section 24. (Para. 3.23)

(2) The Director of Public Prosecutions should be appointed by the Governor acting on the advice of the Judicial and Legal Service Commission. (Para. 3.24)

(3) The Constitution should provide for a qualified person to act as Director of Public Prosecutions where the office is vacant or the holder is for any reason unable to exercise the functions of office. (Para. 3.24)

(4) The Constitution provide for the Director of Public Prosecutions to be a person qualified to be admitted as a Barrister-at-Law (or Attorney-at Law) and to have practiced as such for at least seven years. (Para. 3.24)

(5) The Constitution should provide for the removal of the Director of Public Prosecutions in circumstances of gross inability to exercise the functions of office and for misbehaviour in office. (Para 3.26)

(6) The removal of the Director of Public Prosecutions must be in accordance with a procedure prescribed in the Constitution whereby the question of removal has been referred either to the Judicial and Legal Service Commission or to some other independent Tribunal established for such purpose and accorded constitutional status.(Para 3.26)

(7) The Constitution should also provide that once the question of removal of the Director of Public Prosecutions has been referred to the Judicial and Legal Service Commission or an independent Tribunal, the Director shall be suspended from office pending the outcome of such procedure and a qualified person appointed to act in his stead. (Para 3.26)

(8) The Attorney General should be an *ex officio non-voting* member of the Cabinet. (Para. 3.27)

(9) The Constitution must expressly establish the office of Attorney General in like manner as it currently provides for the office of Governor, Deputy Governor and Auditor. (Para. 3.27)

(10) The Attorney General should be a person qualified to be admitted in the Virgin Islands as a Barrister-at-Law (or Attorney-at-Law) and have a minimum of ten years practice as a Barrister, this being the minimum qualifications for appointment as a Judge of the High Court. (Para. 3.30)

(11) The Constitution should provide for the office of Attorney General to be filled in the first instance by a suitably qualified Belonger. (Para. 3.28)

(12) The post of Solicitor General should be established within the Attorney General's Chambers. (Para. 3.29)

(13) The Solicitor General, which would not be a constitutional office, should be responsible, *inter alia*, for handling the civil litigation work of the Attorney General's Chambers, and would be appointed to act as Attorney General when the office of Attorney General is vacant or the holder is unable for any reason to exercise the functions of that office. (Para. 3.29)

(14) The Solicitor General shall be a person qualified to be admitted in the Virgin Islands as a Barrister-at-Law (or Attorney-at-Law) and have a minimum of seven years practice as a Barrister. (Para. 3.30)

(15) The Solicitor General be a suitably qualified Belonger in the first instance. (Para. 3.29)

Issue No. 2 – Belonger Status

(16) The definition of "settled" in section 2(2)(a)(ii) of the Constitution be clarified and refined so as to specifically exclude persons on contract with the Government of the Virgin Islands and any of its statutory bodies and Crown corporations. This

can be achieved by the addition, at the end of the definition of the term "settled", the words: "but does not include persons on contract with the Government of the Virgin Islands or any of its statutory bodies or Crown corporations". (Para 4.21)

(17) Section 2(2)(c) of the Constitution relating to a child born outside the Territory and adopted in the Virgin Islands by parents who are Belongers by birth or descent being deemed to belong, ought to be retained.(Para 4.27)

(18) Second generation Virgin Islanders born outside the Territory whose grandparent was born in the Territory, should be deemed to Belong to the Virgin Islands. (Para. 4.32)

(19) As regards the third generation of Virgin Islanders born outside the Virgin Islands whose great-grandparent was born in the Virgin Islands, matters of the inheritance of land are relevant and must be protected through some legislative mechanism. Accordingly, such persons ought, as a matter of government policy expressed in the relevant legislation, to be exempt, upon application, from the requirement of obtaining a land-holding licence to hold property in the Virgin Islands. (Para. 4.33)

(20) Likewise, provision ought to be made for such third generation Virgin Islander to be made Belongers upon such persons residing in the Territory continuously for a minimum period of 3 years. (Para. 4.33)

(21) The current practice whereby most, if not all applications for naturalization, are presented by the Governor to Executive Council for their approval, although not strictly required, ought to be continued as a convention. (Para. 4.35)

(22) In due course consideration be given by the Government of the United Kingdom to giving legislative effect to this convention. (Para. 4.35)

(23) Section 2(2)(a)(ii) - the definition of "settled" be changed to read: "settled" means ordinarily resident in the Virgin Islands without being subject under the laws in force in the Virgin Islands to any restriction on the period for which he may remain but not to include public officers on contract with the Government of the Virgin Islands or any statutory body or Crown corporation. (Para. 4.37)

(24) Section 2(2)(d) be amended to read as follows: 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 by decent. (Para. 4.37)

Issue No. 3 – Indigenous People - Eligibility to Hold Elected Office

(25) The Commission does not consider it essential to define or categorize Virgin Islanders as "an indigenous people" as a means of protecting their rights and privileges, in particular, the right to hold elected office in the Legislative Council. (Para. 5.32)

(26) The Commission shares the broad view that the rights and privileges of Virgin Islanders can best be protected through the constitutional legislative process of the Territory. (Para. 5.32)

(27) The Commission agrees with the sentiments generally expressed by the public as well as current membership of the Legislative Council, that those who are qualified to hold elected membership in the Legislature must reflect a common heritage as a people and that historically this has best been effected through a common lineage and place of birth. (Para. 5.32)

(28) That **birth** and **descent** underlie the basic qualifications for holding elected membership in the Legislative Council. (Paras. 5.27 & 5.32)

(29) The term "British Subject" be removed as a qualification to hold elected membership in the Legislative Council, and replaced by the term "Virgin Islander" who is a person deemed to belong by birth or descent being - (Paras. 5.23 & 5.32)

(i) born in the Virgin Islands of a father or mother who is a British Overseas Territories Citizen by birth or descent;
(ii) born in the Virgin Islands of a father or mother who is deemed to belong to the Virgin Islands by birth or descent;
(iii) born outside the Virgin Islands of a father or mother who is

deemed to belong to the Virgin Islands by birth or descent; provided that persons born outside the Virgin Islands who are deemed to belong by descent will not be so qualified beyond the second generation;

(30) Persons born outside the Virgin Islands who are deemed to belong by descent will not be qualified to hold elected membership in the Legislative Council beyond the second generation. (Paras. 5.28 & 5.32)

(31) A person born outside or in the Territory and who would otherwise qualify to hold elected membership in the Legislative Council would not be so qualified unless a period of residency has been fulfilled as follows: (Paras. 5.29 & 5.32)

(i) if that person has never been domiciled in the Virgin Islands, the period of residency should be the legal possible term of the Legislative Council, plus one year;

(ii) if a person formerly domiciled in the Virgin Islands has lived outside the Virgin Islands for a continuous period greater than ten years (excluding periods related to medical or educational purposes); such a person must have re-established residency in the Virgin Islands for a period of not less than three years immediately before the date of his nomination for election and is domiciled in the Virgin Islands at that date.

(32) All persons who at the time of the coming into being of these recommendations would otherwise have had the right to hold a seat in the Legislature should continue to enjoy such a right and should not be disqualified from so doing. (Para. 5.32)

Issue No. 4 – The Sixth Ministerial Position

(33) The Constitution provide for a sixth ministerial position. (Para. 6.15)

(34) In order to maintain discipline in the Cabinet and to ensure accountability to the Legislative Council there should be a compensating addition of at least two seats in the Legislative Council either two At-Large seats or two District seats. (Para.

6.15)

Issue No. 5 – A Human Rights Chapter

(35) An appropriate 'Human Rights Chapter' or Fundamental Rights and Freedoms be included in a new Constitution. (Para. 7.11)

(36) The Draft Model Chapter on Fundamental Rights dated 15th May 2001 is too long-winded and too detailed in some of its provisions. A revised Draft Chapter, taking into account the Recommendations in this Report, be produced expeditiously for inclusion in the Constitution. (Para. 7.13)

(37) The Government set up a committee, consisting of persons from the private and public Bar and from social development or social services, to plan for the implementation of a Legal Aid Scheme to suit the needs and requirements of the Virgin Islands. (Para. 7.13).

(38) ***Article 5(4)*** – A person arrested must be informed of his or her rights at the time of arrest, wherever that may be, and the Draft Model be changed to so provide. (Para. 7.13)

(39) ***Article 5(5)***- This provision should limit the period for which a person arrested must be taken before a court to no longer than 48 hours. Accordingly, the words *"such period shall not exceed 48 hours unless extended by the court in the public interest"" should* be added to this provision. (Para. 7.13)

(40) ***Article 19*** – Any reference in this Article to the "Supreme Court" must be defined and construed as a reference to the Eastern Caribbean Supreme Court, as a court of first instance to adjudicate on matters of alleged breaches of the fundamental rights and freedoms provisions. (Para. 7.13)

(41) **Article 19** - Be replaced with a provision along the lines of Article 16 of the Anguilla Constitution. (Para. 7.13)

(42) **Other Provisions** – The changes set out in the Schedule to this Report ought to

be incorporated into any draft Chapter on Fundamental Rights. (Para 7.13)

(43) Matters concerning the protection of the environment are best dealt with, at this stage, by an appropriate, stringent and penal cadre of environmental legislation.(Para. 7.17)

(44) Every child of appropriate age and residence status in the Territory, as provided by law, ought to be entitled to receive primary education free of costs in the public schools; and, likewise, all Belongers up to the secondary level. However, this right ought not, at this stage, to be elevated to constitutional protection as it is and can be adequately provided for in the Education Act. (Para. 7.24)

(45) The Human Rights Chapter should be positioned at the beginning of the new Constitution, immediately after the provisions dealing with Belonger status, thereby giving its provisions the kind of prominence such important rights deserve. (Para. 7.25)

Issue No. 6 – Governor's Reserve Powers

(46) Section 3(2) of the Constitution be changed to provide for a Cabinet as the body administering the affairs of the Territory with the Governor's administrative role related only to his special responsibilities. (Para. 8.2)

(47) The formulation of policy, insofar as it relates to every aspect of Government, except those which may fall under the Governor's special responsibilities, should be constitutionally reposed in the Cabinet (Para. 8.3)

(48) The Public Service be removed as one of the Governor's special responsibilities. (Para. 8.10)

(49) The Constitution provide for a Public Service Commission vested with executive authority to hire, fire and discipline public servants. (Para. 8.9)

(50) The Public Service Commission consist of a membership of seven comprising persons from the business community, the legal profession and a sister island. The life of the Public Service Commission should be five years. (Para. 8.9)

(51) The Constitution provide for the Chief Minister to have overall responsibility for the administration of the Public Service including matters of policy and for reporting on such matters to the Legislative Council. (Para. 8.10)

(52) The Public Service Commission shall report to the Chief Minister with regard to matters concerning the Public Service within the function of the Commission. (Para. 8.10)

(53) The current movement towards giving department heads greater autonomy to hire junior and mid level personnel should remain. (Para. 8.10)

(54) Line Managers remain accountable to the Public Service Commission (Para. 8.10)

(55) Permanent Secretaries and Heads of Departments be appointed after consultation with the Chief Minister. (Para. 8.10)

(56) Consequently, section 53 of the Constitution will have to be amended. (Para. 8.10)

(57) The Constitution provide for an Appeals Tribunal consisting of three persons from decisions of the Public Service Commission, with appeals therefrom to the High Court. (Para. 8.11)

(58) The Territory needs to be much more involved in its external affairs by sitting at the table and making its own representation, particularly in matters of Financial Services, regional and inter-Caribbean affairs. (Para 8.14)

(59) The Governor and the Chief Minister share responsibility for External Affairs and this be constitutionally recognized with the Chief Minister being primarily responsible for matters of Financial Services, regional and inter-Caribbean affairs. (Para. 8.15)

(60) The subject of Internal Security and the Police Force cease to be the sole responsibility of the Governor and this responsibility shared with the elected representatives who should have a direct say in the decision making and policy

making matters concerning this subject. (Para 8.19)

(61) There be established under the Constitution a National Security Council responsible for all matters of policy and oversight relating to Internal Security including the Police Force. (Para. 8.20)

(62) The National Security Council be comprised the Governor, the Chief Minister and one other Minister (who will be responsible for the subject of Internal Security, including the Police in the Legislative Council), the Attorney General and the Commissioner of Police, as non-voting ex-officio members. (Para. 8.20)

(63) The day to day operation of the Police Force remain the responsibility of the Commissioner of Police who shall be directly accountable for its operation to the National Security Council and the Constitution should so provide. (Para 8.21)

(64) The established weekly briefings and all briefings on matters of Internal Security including the police be made by the Commissioner of Police to the National Security Council and the Constitution should so provide. (Para. 8.22)

(65) The Constitution provide for a Police Service Commission which will be primarily responsible for hiring, promotions, disciplinary issues within the Police Force and liaising with the general public. (Para. 8.23)

(66) The Constitution provide for Non-Gazetted Police Officers who are to be hired to be reviewed by the Police Service Commission, who will advise the Commissioner of Police. (Para 8.25)

(67) The Constitution provide for Gazetted Officers who are to be hired or promoted to be approved by the National Security Council. (Para 8. 25)

(68) The appeals procedure set out in the Police Act (Chapter 165) relating to offences and matters of discipline ought to be changed so as to provide that Non- Gazetted officers to appeal to the Police Service Commission and Gazetted Officers to appeal to the National Security Council. (Para. 8.26)

(69) The Police Act be amended to give effect to these changes. (Para. 8.27)

(70) Psychological profiling must be part of the hiring process for police officers. (Para 8.23)

(71) Matters relating to the administration of the courts remain with the Governor. (Para 8.30)

(72) In the event that the Commission's recommendations for transferring the responsibilities for the Public Service and/or the Police Force from the Governor are accepted and implemented, the Governor's reserved powers under Section 44 should not be retained in a new Constitution. (Para. 8.35)

Issue No. 7 – Cabinet System of Government

(73) Executive Authority for the Virgin Islands shall continue to be vested in Her Majesty. (Para. 9.27)

(74) Executive Council be replaced with a Cabinet consisting of the Chief Minister (or Premier) and not less than four and not more than five other Ministers, with the Attorney General and a representative of the United Kingdom Government in and for the Virgin Islands ***("the Resident")*** as *non-voting* ex-officio members. (Para. 9.27)

(75) The Chief Minister (or Premier) preside at all meeting of the Cabinet and in his absence the Deputy Chief Minister shall preside. In the absence of both, another Minister designated in advance by the Chief Minister shall preside. (Para. 9.27)

(76) Section 23(3) of the Constitution be amended to provide for a quorum at meetings of the Cabinet to consist of three Ministers present besides the Chief Minister or other person presiding. (Para. 9.27)

(77) The Cabinet shall meet regularly and shall not be summoned except by the authority of the Chief Minister acting in his discretion: Provided that the Chief Minister shall summon the Cabinet if the Governor so requests. (Para. 9.27)

(78) There shall be a Cabinet Secretary who shall be a senior public servant appointed on the advice of the Chief Minister who shall attend all meetings of the Cabinet and be responsible for the management of the affairs of the Cabinet including the record keeping of the deliberations and decisions of the Cabinet. (Para. 9.27)

(79) The principle of collective responsibility shall apply to decisions of the Cabinet. (Para. 9.27)

(80) The Governor shall be presented, in advance of each Cabinet meeting and at the same time as the members of the Cabinet, with all papers and supporting documents to be tabled or considered at meetings of the Cabinet including the agenda. (Para. 9.27)

(81) The Governor shall be kept regularly informed of all decisions of the Cabinet which shall be promptly communicated in writing to him by the Cabinet Secretary and, in any event, not later than within forty-eight hours of the conclusion of the meeting at which such decision was made. (Para. 9.27)

(82) The Cabinet shall not make any decision regarding any matter which falls under the Governor's special responsibilities unless such deliberations relate to a question of funding specifically requested by the Governor for any such matter. (Para. 9.27)

(83) Where the Governor requests in writing addressed to the Chief Minister and copied to the Cabinet Secretary, that any matter on the agenda for discussion at a Cabinet meeting should be deferred or not proceeded with as infringing on or adversely affecting the exercise of any of the Governor's areas of special responsibility or is likely to be prejudicial or cause embarrassment to Her Majesty or the Government of the United Kingdom in the discharge of any of its international treaty obligations, the Cabinet shall not deliberate or make any decision thereon unless a decision on such deferred matter is subsequently sanctioned by the Governor or the Secretary of State. (Para. 9.27)

(84) In all matters relating to internal security and the Police, the Cabinet shall act in accordance with the policy decisions of the National Security Council. (Para.

9.27)

(85) All references to the "Governor" are to be construed as meaning "Her Majesty's Representative in the Virgin Islands". (Para. 9.27)

Other Issues

(86) A Schedule of Sections be included at the very beginning of the new Constitution. (Para 10.10)

(87) A new Constitution must speak to who we are, both as a country and as a people. This is essential to nation building and the march to self-determination. (Para. 10.13)

(88) The Constitution should contain an appropriately worded 'Preamble'. (Para. 10. 15)

(89) A draft Preamble (Para. 10.16) reads as follows:

Whereas *The People of the Territory of the Virgin Islands have for over a century evolved with a distinct cultural identity which is the essence of a Virgin Islander;*

Acknowledging *that our society is based upon certain moral, spiritual and democratic values including a belief in God, the dignity of the human person, the freedom of the individual and respect for fundamental human rights and freedoms and the rule of law;*

Mindful *that we have expressed a desire for our Constitution to reflect who we are as a People and a country and our quest for social justice, economic empowerment and political advancement;*

Recognizing *that as a People we have a free and independent spirit, and have developed ourselves and our country based on qualities of honesty, integrity, mutual respect, self-reliance and the ownership of the land engendering a strong sense of belonging to and kinship with these 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 connectivity and bond with these islands;*

Accepting *that the Virgin Islands should be governed based on adherence to well established democratic principles and institutions;*

Affirming *that we have generally expressed our desire to become a self-governing people and to exercise the highest degree of control over the affairs of our country at this stage of its development; 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.*

NOW THEREFORE Her Majesty, by virtue and in exercise of the power vested in Her by Section 5 of the West Indies Act 1962 (a) and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows: - etc.

(90) The Commission favours, as much as is possible, the use of more 'conventional', as opposed to 'legalistic' English, in the drafting of the new Constitution, so as to make it more 'reader friendly'. (Para. 10.17)

(91) The Commission considers that in today's world, the appointment of a Governor ought, in the very least, to be made after consultation with the Chief Minister as to a short list of the persons being considered for appointment under section 3(1) of the Constitution, and also, that any change from the present position ought to be reflected in a new Constitution. (Para. 10.20)

(92) The UK Representative for the Virgin Islands ought to styled "the Resident" (who will be distinct from the "Governor" as Her Majesty's Representative), to accord with the status of such office under a new Constitution. (Para. 10.21)

(93) The Constitution expressly provide for the appropriate Minister and Ministry to continue to have responsibility for administering all Crown lands. (Para. 10.26)

(94) The Constitution provide for all dispositions or grants of Crown lands to require prior Cabinet approval (which, as we understand it, is the current practice relative to Executive Council). (Para. 10.27)

(95) The actual execution of any disposition or grant of Crown lands must either be done by Her Majesty's Representative or by the responsible Minister under and by virtue of the written delegated authority of Her Majesty's Representative. (Para. 10.27)

(96) Section 11(1) of the Constitution, which provides for the membership of the Mercy Committee, be changed to replace "Chief Medical Officer" with "Director of Health Services" or some other appropriate designation. (Para. 10.29)

(97) In the event that the Commission's recommendations for a Cabinet system and for transferring responsibility for the Public Service and the Police from the Governor, are accepted and implemented, there ought to be a change in designation from "Chief Minister" to "Premier", which accords a higher status internationally. (Para. 10.32)

(98) Section 16(3)(e) be removed from the Constitution altogether. (Para. 10.34)

(99) Section 17(1) be redrafted to provide for the Deputy Chief Minister to automatically act as Chief Minister in circumstances where the latter is to be absent from the Territory for a period in excess of forty-eight hours; and for the requirement for notice of such appointment to be published in the Gazette to be removed. (Para. 10.37)

(100) Where both the Chief Minister and his Deputy are absent from the Territory at the same time for more than forty-eight hours, the Constitution should provide for another Minister, designated by the Chief Minister, to be appointed to act as Chief Minister and to perform the functions of that office. (Para. 10.37)

(101) In each instant, any such appointment or assumption of office should automatically cease upon the return to the Territory of the Chief Minister, unless he is incapacitated and cannot perform the functions of office. (Para. 10.37)

(102) The requirement for one to have a class of British citizenship, as one of the qualifications for elected membership and also for voting, ought to be removed altogether from the relevant sections of the Constitution. (Para. 10.43)

(103) As regards the qualification for registration as a voter under section 31(1), the term "British Subject" should be deleted. (Para. 10.45)

(104) The only status for eligibility to be registered to vote should be that provided under section 2(2) of the Constitution, that is, Belonger status. (Para. 10.47)

(105) Sub-paragraph (a) of section 29 of the Constitution (swearing allegiance, obedience or adherence to a foreign power) ought to be removed as a disqualification for elected membership under section 29. (Para. 10.51)

(106) The proviso to section 30(2)(e) of the Constitution be amended to stipulate, or to put it beyond doubt, that requests by a Member of the Legislative Council for exemption from having to vacate his seat, must be made by way of Motion, placed on the Order Paper and debated at the next sitting of the Legislative Council. (Para. 10.62)

(107) The ability to declare a State of Emergency in appropriate circumstances, ought to be included in the new Constitution at the end of the chapter on fundamental rights and freedoms, as is usually the case. (Para. 10.68)

(108) In addition, provision ought to be made for declarations of a State of Emergency to be made by the Cabinet, after consultation with the Governor (or Her Majesty's Representative) in the Virgin Islands, such declarations to be laid before the Legislative Council and to expire within 14 days, unless extended by an affirmative vote of the Council for a period not exceeding three months from the date on which it would have expired. (Para. 10.68)

(109) The new Constitution must speak to the Courts or the Judiciary. (Para 10.69)

(110) Whatever the decision locally, whether to establish a separate Court system with its own judiciary for the Virgin Islands or to establish a stand-alone Commercial

Court, or to remain a part of the Eastern Caribbean Supreme Court system, the Constitution ought to reflect that court system in specific provisions. (Para. 10.71)

(111) As the Virgin Islands moves forward towards self-determination there ought to be an organized campaign to involve native Virgin Islanders in designing and formulating national symbols. (Para 10.75)

(112) Where such advancements, as recommended in this Report, have been accepted and implemented. the designation "House of Assembly" ought to be adopted for "Legislative Council".(Para 10.76)

(113) Section 64(1) of the Constitution be amended to provide for the Public Debt to also be a charge on the Debt Service Fund, which should likewise be given constitutional recognition. (Para. 10.77)

(114) Section 57 of the Constitution, which provides for "awards" granted under any law in force in the Virgin Islands to be charged and paid out of the Consolidated Fund, be amended to enable such awards to also be paid from the 'Pension Fund', when established. (Para. 10.78)

(115) Section 66(3) of the Constitution be amended to require the Annual Audit Report to be submitted by the Auditor General directly to the Speaker of the Legislative Council for tabling at the next sitting of the Council, with a copy submitted to the Minister of Finance at the same time as the Speaker. (Para. 10.79)

(116) Section 66(1) and all other sections, must be changed to conform with that nomenclature used in the Audit Act 2003 of "Auditor General" instead of "Auditor". (Para. 10.81)

Appendix 1

TERMS OF REFERENCE

To conduct a review of the Virgin Islands (Constitution) Order 1967 (UK SI No. 2145) with a view to ensuring the British Virgin Islands' continued advancement and good governance and, in particular, to review the following:

(8) The duties of the Attorney General as the chief legal adviser to the Government and also as public prosecutor, with a view to separating those duties and reposing the function of public prosecutor in a Director of Public Prosecutions.

(9) The provision for a clear definition of "a Belonger", in particular persons who may be deemed to belong to the British Virgin Islands, but who may not enjoy BOTC status under the British Nationality Act 1981, with the entitlement to a passport that such status offers;

(10) The protection of the rights and privileges of the indigenous people of the British Virgin Islands, by limited the ability of non-indigenous persons to hold elected office.;

(11) The introduction of a sixth ministerial position in light of the increase in the size of the Government and the need to ensure greater efficiency and productivity;

(12) The need for a human rights chapter in the Constitution;

(13) Having regard to the reserve powers of the Governor, to consider the feasibility of scaling down those powers and establishing a viable system of checks and balance to ensure continued good governance; and

(14) Considering the existing system relating to the functioning of the Executive Council, to provide a critical analysis on the feasibility of establishing a cabinet system of government for the British Virgin Islands.

Appendix 2

MEMBERS OF THE COMMISSION

Mr. Gerard Farara, Q.C. (Chairman)
Mr. Elihu Rhymer (Member)
Mr. Edison O'Neal (Member)
Mr. Vance Lewis (Member)
Mr. Audley Maduro (Member)
Mr. Carvin Malone (Member)
Mr. Stuart Donovan (Member)
Mrs. Persia Stoutt (Member)
Mrs. JoAnn Williams-Roberts (Member)

Appendix 3

POSITION PAPER FROM THE LEGISLATIVE COUNCIL

Legislative Council of the Virgin Islands
Position Paper on the Review of
The Virgin Islands (Constitution) Order 1976

The Virgin Islands Constitution Order 1976 was laid before Parliament on 23rd December 1976 and came into operation on 1st June 1977. Amendments to the Constitution were made in 1976, 1982, 1991 and, most recently, 2000.

On 15th April 2004, a Commission was appointed with seven specific Terms of Reference (TOR) to conduct a review of the Virgin Islands (Constitution) Order 1967 (UK SI No. 2145) with a view to ensuring the British Virgin Islands' continued advancement and good governance.

Three Meetings of Elected Members (Members) of the Legislative Council were held on 21st October, 3rd November, and 9th December 2004 to discuss the TOR and agree on proposed changes. On 21st December 2004 Members met with the Constitutional Review Commission (the Commission).

This paper is based on Members' considered position with respect to the need for a Constitution which would work best for the Territory, allowing more autonomy to manage its affairs, while at the same time affording the UK, as governing country, some measure of comfort in enacting such a Constitution.

TOR 7

Consider the existing system relating to the functioning of the Executive Council, to provide a critical analysis on the feasibility of establishing a Cabinet system of government for the British Virgin Islands.

It is the position of Members that the BVI has progressed to the point where it is no longer necessary for the Governor to either preside over, or be present at, Executive Council meetings. The Territory is excelling internationally and for a

Governor to be exercising such sweeping constitutional powers for the purpose of administering the Government of the Virgin Islands constitutes somewhat of an anachronism. The Territory is ready for a Cabinet system. Members therefore take the position that:

in keeping with the removal of the Governor from presiding over Executive Council a *Cabinet* should replace the *Executive Council* and the term P*remier* should replace the term *Chief Minister*. A Cabinet should be established with a Premier and his/her Ministers with the Premier as Chairman.

TOR 1

The duties of the Attorney General as the Chief Adviser to the Government and also as Public Prosecutor, with a view to separating those duties and reposing the function of Public Prosecutor in a Director of Public Prosecutions.

The Attorney General (AG) is an officer of the Court, Chief Legal Officer of the Crown, a Member of Executive Council, an ex-officio Member of Legislative Council, Chief Legal adviser to Government, principal legal draftsman for Government, has unfettered prosecutorial powers and is a Member of the Mercy Committee. Given these many and very important duties, Members take the position that:

(i) there shall be a Ministry of Justice/Legal Affairs/Home Affairs which will not only have responsibility for matters of justice but for any other subjects the Chief Minister assigns. (For further discussion on the role of the Ministry of Justice/Legal Affairs/Home Affairs, please see (vi), (vii) and 6(xi);

(ii) There shall be an AG, who should preferably be a Belonger of the Virgin Islands (a Belonger), and who shall be appointed through the Judicial and Legal Services Commission process;

(iii) the office of the Director of Public Prosecution (DPP) should be constitutionally established and the provisions of Section 24(1), (2), (3), and (4) of the Constitution should be transferred from the AG to the DPP;

(iv) the AG shall be accountable to the Minister of Justice/Legal Affairs/Home Affairs;

(v) the DPP shall be appointed through the Judicial and Legal Services Commission process;

(vi) the Office of the DPP shall have clearly defined lines of accountability to the Minister for Justice/Legal Affairs/Home Affairs;

(vii) there shall be put in place a system of transparent checks and balances by way of guidelines to ensure impartiality, and to prevent any potential political interference or abuse in the exercise of the powers of the DPP, affording him/her the necessary prosecutorial independence, and providing for sanctions for such political interference or abuse;

(viii) given the need for the prosecutorial independence of the of the DPP, there shall be provision for an independent and effective review of performance, as a safeguard in the Territory's interest within the Criminal Justice system, against an overzealous or indifferent DPP;

(ix) by reposing the prosecutorial functions in a DPP, the AG's membership on the Mercy Committee would cease to constitute a conflict;

(x) there shall be a Deputy AG or a Solicitor General who shall be next in line to the AG and shall be a Belonger;

(xi) the AG shall be removed as a Member of Executive Council, being called to advise as the need arises;

(xii) the AG shall be removed as an ex-officio Member of Legislative Council, but should be available for advice as needed;

(xiii) The Judicial and Legal Services Commission should be expanded to include two additional "fit and proper" persons from the BVI.

TOR 2

The provision for a clear definition of "a Belonger," in particular persons who may be deemed to belong to the British Virgin Islands, but who may not enjoy BOTC status under the British Nationality Act 1981, with the entitlement to a passport that such status offers.

Information reaching Members suggests that Belongers constitute only about 45% of the population and about 36% of the workforce. This "approaching extinction" condition has come about, in part, because of the stringent criteria governing who may become a Belonger.

In addition, there are some inequities with respect to rights and privileges conferred on one group as opposed to another, which need to be regularized; for example a child of a BVIslander born outside the BVI may not be deemed to belong, whereas a child of a non-belonger not born in, and residing outside, the BVI but adopted by Belonger parents is deemed to belong; furthermore, second-generation descendents of BVIslanders would be at liberty to develop, instead of selling out, inherited land, thereby slowing down the increase in alien land holdings, if belongership is conferred.

Members consider it necessary to augment the Belonger population in ways that could positively impact the direction of the Territory for protecting its quality of life. Members believe that this can best be achieved by defining a Belonger as to birth and descent, and then encouraging the cultivating of national pride, among other things. Members therefore take the position that:

(i) the definition of a British subject should be more specifically defined to include children of BVIslanders born outside the Territory up to and including the second generation.;

(ii) decisions with regard to naturalization under the British Nationality Act should be made by Executive Council;

(iii) persons born outside the BVI to a parent or parents who are BVIslanders should be deemed Belongers;

(iv) persons born in the BVI, who meet the ten-year residency qualification, of non-Belonger parents shall be deemed Belongers;
Please note that there is a minority view that persons born in the BVI should be deemed to belong

(v) the children and grandchildren of persons deemed to belong to the Virgin Islands under the provisions of TOR 2 (iii) should be deemed Belongers;

(vi) serious consideration should be given to the issuing of passports to persons born in the BVI who are not BOTCs for the following reasons:

a. children have no control over where they are born;

b. the inconvenience, difficulty and expense of securing a passport from the parents' place of birth for a child who was not born in that country are overly burdensome, unfair and seem unjustified;

c. condition (b) fosters animosity between the child and parent against the BVI, thus defeating the Territory's very attempt to encourage the national pride which is so critical to nation-building and stability.

TOR 3

The protection of the rights and privileges of the indigenous people of the British Virgin Islands, by limiting the ability of non-indigenous persons to hold elected office.

A working Definition of "indigenous" was developed to ensure that children and grandchildren born outside the BVI would be deemed "indigenous" due to their parents or grandparents' ties to the BVI, if these ties could be traced back to 1901. *(see Appendix I)* It is important to note that the term "indigenous" is not a qualification for holding elected office.

While Members feel strongly that relaxing the criteria by which persons may qualify as Belongers, the majority of Members are of equally strong conviction with respect to who should hold elected office.

(i) Members' position in so far as who should be eligible to hold elected office is unevenly split with the majority position for BVIslanders by birth and Belongers by descent (up to the second generation), and the minority position for Belongers by descent only (up to the second generation.)

(ii) persons who have belonger status conferred other than by birth should not be eligible to hold elected office;

(iii) all BVIslanders and Belongers who reside outside of the Territory more than 10 consecutive years except for educational or medical purposes shall fulfil a residency requirement of 5 years before becoming eligible to be nominated to run for elected office;

(iv) the inequity of belongers by descent; that is to say, children born outside of the BVI to BVIslander parents being eligible to hold elected office, while BVIslanders by birth who are naturalised citizens of say, the United States, not being eligible to hold elected office is a double standard that needs to be addressed with a view to eliminating this ineligibility in favour of BVIslanders by birth who are naturalized citizens of other countries, by removing the disqualification from the Constitution;

(v) a "Grandfather Clause" should be included that would allow persons who have already contested elections or have held office to be allowed to continue to do so even if under the proposed amendments they no longer qualify.

TOR 4

The introduction of a sixth ministerial position in light of the increase in the size of the Government and the need to ensure greater efficiency and productivity.

Several factors dictate the need for a sixth ministerial position:

(i) there are presently more than five Ministries but only five Ministers; for instance, the all-important and critical Ministries of Finance on the one hand and Health and Welfare on the other are held by one Minister, the

voluminous and critically important Ministry of Education, Culture and Youth Affairs, by one Minister; and the portfolio of Coordination of Government Policy, Consumer Affairs, Development Proposals, Development Aid, E-Commerce, Economic Planning, Gender Affairs, H. Lavity Stoutt Community College, Immigration, Industrial Development, Information (including monitoring of broadcast media and press), Internal Audit, Investment Promotion, Regional Affairs, Social and Technology, Social Security, Statistics, Tourism, Town and Country Planning, Trade and Business, Weights and Measures are all carried by the Chief Minister;

(ii) the existing administrative framework is inadequate and therefore burdensome;

(iii) the Territory's budget in excess of $200 million is comparable with other countries in the sub-region whose ministerial manpower exceeds by far that of the BVI with comparable portfolios. Introducing a sixth ministerial position may alleviate some of the administrative burden and/or allow for "juggling" of portfolios;

(iv) the economy of the Territory hinges, for the most part, on the twin economic pillars of Tourism and Financial Services; consequently, the Territory is a significant player in the international marketplace. In order to be, and remain, competitive the Territory needs the administrative framework to facilitate its efficient running, and for moving the country forward;

(v) having regard to the growth of the Civil Service to 2506 established and 683 non-established persons, and the wider responsibilities of the central Government for Statutory Boards with a total of 613, for instance, resulting in the heavier and more complex managerial demands of the

Territory's advanced economy, among other things, the establishment of a sixth Ministerial position is an overdue necessity;

(vi) The sixth ministerial position represents constitutional advancement.

TOR 5

The need for a Human Rights Chapter in the Constitution.

Members take the position that there is a need for a Human Rights Chapter to be included in the Constitution.

Recommendation

It is considered that where the Courts declare any BVI Legislation to be violative of the Constitution (especially its Human Rights Provisions) the Courts should under the same Constitution be mandated not to strike down or declare such violations unconstitutional, null, void, or of no effect as is the case in the United States or the Commonwealth Caribbean or Canada, but rather that the Courts should be required to adopt the new UK or New Zealand constitutional remedy of declaring the specific offending legislation to be incompatible with the Constitution thereby leaving the matter to the Legislature itself to remedy the defect. By this means the Court as a third branch of Government (whether it is the Supreme Court or the Privy Council) will not strike down any legislation enacted by the Legislature as the second branch of Government, but will merely declare the incompatibility.

TOR 6

Having regard to the reserve powers of the Governor, to consider the feasibility of scaling down those powers, and establishing a viable system of checks and balances to ensure continued good governance.

Several factors dictate the need for scaling down the Governor's powers and transferring much of his responsibility to the political directorate. Members consider that:

a. there are 613 employees in statutory bodies of the Territory outside of the responsibility of the Governor. There has never been any question with respect to good governance about any of these statutory bodies. In fact, there has always been transparency and accountability;

b. Government continues to ensure compliance with internationally accepted standards of accountability and good governance in its Financial Services sector;

c. Just as financial borrowing guidelines are being established, in the same way management guidelines could be established, under the Chief Minister, to govern any of the powers scaled down from the Governor;

d. Having the Civil Service and the Police Force under a Minister affords legislative transparency and accountability for those subjects.

Members therefore take the position that:

(i) in matters of external affairs, particularly having to do with its Financial Services Sector, Government is competing with the UK Government, and what is in the UK's interest may not necessarily be in the Territory's interest. The Territory therefore needs to be much more involved in its external affairs by sitting at the table and making its own representations;

(ii) the Civil Service (the Service) should be placed in the hands of Government, through a Minister, if Government is to function effectively. As it stands, Government has responsibility but no authority. Having the Service administered by one person, who is always transitory, is to effectively put a stranglehold on Government thereby compromising its ability to carry out its mandate, and therefore of moving the Territory forward;

(iii) the Minister for Finance has the responsibility for funding the Service and does so consistently without outside aid or UK assistance;

(iv) as is presently the case, where experts are needed they can be contracted;

(v) a pool of about 10 top managers in the Service can be rotated as needed for greater efficiency;

(vi) the political directorate considers itself no less capable than the Governor of administering the Service;

(vii) the Service can be governed by

(a) appointing a Public Service Commission (PSC) with executive authority, broad-based membership, broad powers, and long life, with reporting responsibility to the Chief Minister;

(b) providing for a system of appealing the decisions of the PSC either to, say, (a PSC Appeals Board and from there to the Courts, or directly to the Court, or ......)

(viii) responsibility for the Police Force (the Force) needs to be transferred to Government, through a Minister, for the following reasons:

a. the weekly meetings of the Governor, Chief Minister, Deputy Governor, Attorney General and Commissioner of Police have no constitutional basis and, in any event, do not afford Government the level of input in making a significant difference with respect to good or better policing;

b. States of Emergency should be declared by the Chief Minister in consultation with the Cabinet who will inform the Legislative Council which may then be summoned for an emergency meeting;

c. the cultural sensitivities and subtleties of the Territory are far better understood and appreciated by the elected representatives than by a Governor who is transitory, and make for more harmonious and effective policing;

d. it is unacceptable, given the importance and impact of the Force on the Territory's quality of life and economic success and stability, that Government is so marginalised in the Force's operations, disallowing significant Governmental input and having its role limited to one of funding;

e. the escalating crime rate begs the question of greater involvement of the political directorate;

f. the political directorate considers itself capable of administering the Force.

(ix) The Force can be governed by

(a) appointing a Police Services Commission, instead of the one-man rule of the Commissioner of Police, with broad-based membership which will recommend and report to the Chief Minister;

(b) providing for a system of appealing the decisions of the Police Services Commission either to, say, (a Police Service Appeals Board and from there to the Courts, or directly to the Courts, or ....;)

(x) the Chief Minister should therefore be responsible for External Affairs, Internal Security including the Police Force, and the terms and conditions of service of persons holding or acting in Public Offices;

(xi) responsibility for the Administration of the Courts should be assigned to a Minister (of Justice/legal Affairs/Home Affairs) who, inter alia,

(a) would be subject to the recommendations of the Judicial and Legal Services Commission;

(b) would see to the provision of adequate facilities for the operating of the justice system;

(c) would have reporting responsibility for the Court system: the High Court, the Magistrate's Court and the proposed commercial, juvenile, family and small creditors courts.

(xii) the Governor should have responsibility for external defence including armed forces, ceremonial matters, (and such other matters as may specifically belong to or be assigned to the office of the Governor by virtue of Her Majesty's prerogative or enacted law;)

In addition, Members take the position that:

(xiii) the Governor should not Chair or be a Member of Executive Council;

(xiv) TOR 6(i) – (xiii) would represent another step toward constitutional advancement.

OTHER 8

Members also take the position that:

(i) Crown lands should be administered by a Minister responsible to the Cabinet and their disposition should no longer require the signature of the Governor;

(ii) Members of Executive Council are appointed by virtue of their being Members of Legislative Council and are allowed all the rights and privileges of their Ministerial Office, while the non-Ministerial Members of Legislative Council are constitutionally obliged to vacate their seats therein at the next dissolution of the Council after his/her election. This inconsistency needs to be corrected; further, in the unlikely event that a Member of Executive Council has to be replaced, it is a former Legislative Council Member who will be appointed.

Members therefore take the position that every elected Member of the Legislative Council shall retain his/her seat therein at the next dissolution of the Council after his/her election, and shall be entitled to all the rights and privileges thereof, until after the counting of votes on election day whereby it will have been determined who is elected and who is not.

(iii) "British Subject" shall be deleted from Section 31(1) of the Constitution so that Section 31(1) reads:

"Subject to the provisions of subsection (2) of this section, 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 is deemed to belong to the Virgin Islands and that person may be a British Overseas Territories Citizen or may not be a British Overseas Territories Citizen, and on the qualifying date has attained the age of eighteen years –"

(iv) given the thirteen-Member Council, a quorum of the Legislative Council should consist of *seven* members besides the person presiding at the Sitting;

(v) the provision whereby the Chief Minister vacates his seat if he is absent from the Virgin Islands without notice to the Governor should be removed;

(vi) provision should be made for the automatic appointment of the Deputy Chief Minister to act as Chief Minister in the absence of the Chief Minister without notice in the Gazette;

(vii) the office of the Legislative Council should be separate and distinct from the Service for the reasons outlined in the RESTRICTED document attached as *Appendix II*;

Appendix 4

Immigration Policy

For further information please contact:
The Immigration Department
494-3701 ext. 4700

or visit the offices at:
Ashley Ritter Building #341
James Walter Francis Drive
Wickham's Cay I
8:30 a.m. – 4:30 p.m.

Prepared by the Department of Information and Public Relations

Government of the British Virgin Islands

Immigration Policy

(Residence and Belonger Status)

Department of Immigration
Chief Minister's Office

Residence Status

The granting of Certificates of Residence is in accordance with Section 18 (1) of the Immigration and Passport Amendments Act (2000). The Law states that persons applying should be (a) of good character; (b) in the application has stated the intention of residing permanently in the Territory. Executive Council has approved a policy in relation to this section of the law:

1. Among those persons who have applied for residency status before 1 January, 2003 and who have resided continuously in the Territory for more than 20 years, the Board of Immigration will recommend that residence status be granted to those who qualify after the normal screening process.

2. The outstanding backlog will be cleared in the course of 2005.

3. Once this backlog has been cleared, the Board of Immigration will recommend applications once a person has resided continuously in the Territory for a period of 20 years, after the normal screening process.

4. In the case of persons who apply after 31 December, 2002, no more than 25 persons per year shall be granted Residence Status.

5. Continuous residence in the Territory implies a maximum of 90 days absence in any calendar year, excluding absence to pursue further education.

Belonger Status

The Board of Immigration will recommend no more than 25 persons per year for Belonger Status from among those who already are in possession of a Certificate of Residence.

Guidelines

The Board of Immigration will process applications from persons who have resided continuously in the Territory for at least 20 years. Persons can apply for residence status upon reaching their 18th year of continuous residency in the BVI. The Immigration Department, therefore, will receive applications no more than two years before an applicant's 20th year of continuous residence in the Territory.

When applying in person, applicants are given the required supporting documents needed for the processing of applications. In other cases, the Chief Immigration Officer acknowledges applications in writing and advises applicants of additional information needed to process the application.

The sample acknowledgement follows:

Dear Sir/Madam:

Please refer to your application for:

a) A Certificate of Residence

b) A Certificate that a person belongs to the Virgin Islands

Before any further action can be taken on your application, the following information/ materials must be submitted to the Immigration Department.

You are only required to submit the items/information marked "X"

1. Two (2) passport size photographs of yourself and all dependants listed on your application

2. Medical Certificate of each of the above; the certificate should not be more than 30 days old

3. Evidence of support for yourself and dependant(s)

4. Evidence of date of first arrival in the British Virgin Islands

5. Marriage Certificate (if applicable)

6. (a) Two (2) Police Certificates for yourself and each dependant over the age of 16 years from each country where residence was taken up for a period of six months or longer

   (b) Two (2) Police Certificates

7. Two Birth Certificates of each person listed on your application (one original and one copy)

8. Two (2) letters of reference from Belongers or citizens

9. Bank Reference (with current balance)

10. Two (2) copies of your mother's birth certificate

11. Alien Land Holding License and Land Transfer (If applicable)

Yours faithfully,

Chief Immigration Officer

Appendix 5

PERSONS THAT MADE ORAL SUBMISSIONS

HE The Governor, Mr. Thomas Macan
Dr. Hon. D. Orlando Smith, Chief Minister
Mr. Bill Rammell, MP, UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs
Hon. Ronnie W. Skelton, Deputy Chief Minister & Minister of Health and Finance
Hon. V. Inez Archibald, Speaker of the House
Hon. Lloyd K. Black, Minister of Education and Culture
Hon. J. Alvin Christopher, Minister of Natural Resources and Labour
Hon. Paul P. Wattley, Minister of Communications and Works
Hon. Ralph T. O'Neal, OBE, Leader of the Opposition
Hon. Eileene L. Parsons, At-Large Representative
Dr. Hon. Kedrick D. Pickering, Representative of the 7th Electoral District
Hon. Omar W. Hodge, Representative of the 6th Electoral District
Hon. Julien Frazer, Representative of the 3rd Electoral District
Hon. Cherno Jallow, Attorney General
Mrs. Dancia Penn, Q. C., Deputy Governor
Mr. Elton Georges, OBE, CMG, former Deputy Governor
Mr. Michael Bradley, UK Constitutional Advisor to the Overseas Territories
Mr. Clyde Lettsome, Permanent Secretary Chief Minister's Office
Mr. Elroy Turnbull, Ag. Permanent Secretary Chief Minister's Office
Mr. Otto O'Neal, Director Development Planning Unit
Mr. Bennet Smith, Permanent Secretary Health & Welfare
Mrs. Josephine Callwood, Permanent Secretary Education & Culture
Mrs. Annete Dalmida-Scatliffe, Human Resources Department
Ms. Eugenia O'Neal, Director Office of Gender Affairs
Mrs. Medita Wheatley, Secretary-General UNESCO
Mrs. Petrona Smith-James, Director Public Sector Development Programme
Mr. Reynell Fraser, Ag. Commissioner of Police
Mr. Richard Holder, Superintendent (Police)
Mr. Jacob George, Superintendent (Police)
Mr. Claudius Duncan, Superintendent (Police)
Mr. Gillard Rabsatt

Mr. Stanley Gordon
Mrs. Margaret A. Penn
Mr. Renard Penn
Ms. Alice Thomas
Mrs. Angela Burns-Piper
Dr. Quincy Lettsome
Mr. Douglas Wheatley
Mr. Halsted Lima
Mr. Diego Penn
Mr. David O'Neal
Mr. Charles Peaker
Mr. Vincent Wheatley
Ms. Franka Pickering
Mr. Alverson Vanterpool
Mr. Steve Turnbull
Mr. Cecil Hodge
Mr. Daniel Cline
Mr. Noel Callwood
Mrs. Harriet Herbert
Mr. Troy Christopher
Mr. Darvin Potter
Mr. Frank Mahoney
Mr. Limuel Smith
Mrs. Una Scatliffe
Mr. Maurice Donovan
Miss Carla Romney
Mr. Archie Christian
Mr. Lambert DeCastro
Mrs. Luce Hodge-Smith
Miss Anthea Smith
Mr. Freddy Creque
Mr. Ulric Pilgrim
Mr. Ronald Donovan
Mr. Bingly Richardson
Mr. Stanley Dawson
Mr. Godfrey DeCastro

Dr. Berny Harrigan
Mr. Patrick Anthony
Miss Nadia Harrigan
Mr. Anthony Ottley
Ms. Sheila Brathwaite
Mr. Earl Frazer
Mr. Julian Willock
Mr. Roy Pickering
Pastor Oliver Hodge
Mr. Louis Potter
Mr. Billy Flemming
Mrs. Yvonne Dawson
Mr. Dennis Rhymer
Ms. Edna Williams
Mr. Bruce Donath
Mr. Selvin Chinnery
Mr. Albert Chinnery
Ms. Merlyn Gordon
Mr. Dalvern Callwood

Appendix 6

PERSONS THAT MADE WRITTEN SUBMISSIONS

Mr. Wendell Gaskin, President Civil Service Association
Mrs. Sonia Webster, Auditor General
Ms. Shana Smith
Mr. Richard Parsons, Lawyer
Mr. Jamal Smith, Lawyer
Ms. Violet Gaul
Mr. Tony Edwards
Ms. Eugenia O'Neal, Director Office of Gender Affairs
Mrs. Medita Wheatley, Secretary-General UNESCO
Mrs. Petrona Smith-James, Director Public Sector Development Programme
Hon. Cherno Jallow, Attorney General
Hon. Ralph T. O'Neal, OBE, Leader of the Opposition
Hon. Julien Frazer, Representative of the 3rd Electoral District

Appendix 7

STATISTICS

SCHOOL 2003-2004

Public Primary Schools

SCHOOL	STUDENTS			TEACHERS		
	Male	Female	Total	Male	Female	Total
Alexandrina Maduro	96	73	169	2	8	10
Althea Scatliffe Primary	225	259	484	5	28	33
Anegada Primary	7	11	18	1	4	5
Belle Vue Primary	71	59	130	0	7	7
Bregado Flax Primary	65	62	127	1	9	10
Ebenezer Thomas Primary	75	84	159	1	8	9
Enid Scatliffe Pre-Primary	120	84	204	1	13	14
Enis Adams Primary	94	71	165	1	6	7
Eslyn Henley Richez	10	7	17	0	4	4

SCHOOL	STUDENTS			TEACHERS		
	Male	Female	Total	Male	Female	Total
Francis Lettsome Primary	93	104	197	0	9	9
Isabella Morris Primary	34	40	74	1	4	5
Ivan Dawson Primary	66	50	116	1	6	7
Jost Van Dyke Primary	8	16	24	0	3	3
Leonora Delville Primary	52	47	99	1	7	8
Robinson O'Neal Primary	71	47	118	0	8	8
Willard Wheatley Primary	92	93	185	1	10	11
TOTAL	1087	1014	2286	15	124	150

SCHOOL 2002-2003

Public Secondary Schools

SCHOOLS		STUDENTS		
YEAR		MALE	FEMALE	TOTAL
2002	ANEGADA	8	8	16
	BFEC	80	120	200
	BVIHS	637	633	1270
	PREVOC	24	3	27
2003	ANEGADA	9	9	18
	BFEC	77	128	205
	BVIHS	649	682	1331
	PREVOC	20	5	25

1994 – 2004

Residence Status

YEAR	PERSONS		
	Male	Female	Total
1994 - 2004	246	243	489

1994 – 2004

Belonger Status by Grant

YEAR	PERSONS		
	Male	Female	Total
1994 - 2004	175	162	337

1994 – 2004

Belonger Status by Naturalization

YEAR	PERSONS		
	Male	Female	Total
1994	24	31	55
1995	20	33	53
1996	12	36	48
1997	31	42	73
1998	58	64	122
1999	19	48	67
2000	25	58	83
2001	13	48	61
2002	14	41	55
2003	26	24	50
2004	22	83	105

1994 – 2004

Belonger Status by Registration

YEAR	PERSONS		
	Male	Female	Total
1994	11	17	28
1995	13	26	39
1996	29	12	41
1997	26	23	49
1998	39	46	85
1999	41	35	76
2000	76	87	163
2001	143	138	281
2002	47	59	106
2003	25	43	68
2004	32	64	96

Appendix 8

COMMISSION'S DIARY OF ACTIVITIES 2004-2005

Date	Activity
23rd April 2004	Meeting at the Office of the Commission
27th April 2004	Chairman appeared on radio programme – 'The Hot Seat'
30th April 2004	Meeting at the Office of the Commission
20th May 2004	Meeting at the Office of the Commission with Hon. Attorney General
2nd June 2004	Public Meeting in Road Town, Tortola
3rd June 2004	Meeting at the Office of the Commission
25th June 2004	Chairman met with 6 UK Parliamentarians at Long Bay Hotel, Tortola
29th June 2004	Meeting at the Office of the Commission
30th June 2004	Public Meeting in East End/Long Look, Tortola
1st July 2004	Meeting at the Governor's residence with His Excellency the Governor
6th July 2004	Meeting at the Office of the Commission with Mr. Michael Bradley
8th July 2004	Member Elihu Rhymer appeared on radio programme 'Umoja'
15th July 2004	Meeting at the Office of the Commission with the Hon. Attorney General - Chairman appeared on radio programme 'Umoja'
17th July 2004	Member Carvin Malone appeared on radio programme 'Teen Talk'
21st July 2004	Public Meeting in the Valley, Virgin Gorda
29th July 2004	Meeting at the Office of the Commission
23rd August 2004	Public Meeting in the Valley, Virgin Gorda
26th August 2004	Meeting at the Office of the Commission
3rd September 2004	Meeting at the Office of the Commission with Hon. Bill Rammell and His Excellency the Governor
8th September 2004	Meeting at the Office of the Commission
9th September 2004	Members Audley Maduro and Persia Stoutt appeared on radio programme 'Umoja'
13th September 2004	Public Meeting in Long Trench/ Belle Vue, Tortola
20th September 2004	Public Meeting in Brewers Bay/Meyers, Tortola
22nd September 2004	Meeting at the Office of the Commission
23rd September 2004	Members Vance Lewis and JoAnn Williams-Roberts appeared on

	radio programme 'Umoja'
26th September 2004	Public Meeting in the Settlement, Anegada
4th October 2004	Public Meeting in Sea Cows Bay, Tortola
6th October 2004	Meeting at the Office of the Commission
7th October 2004	Members Carvin Malone and Stuart Donovan appeared on radio programme 'Umoja'
11th October 204	Public Meeting in Great Harbour, Jost Van Dyke
13th October 2004	Meeting at the Office of the Commission
18th October 2004	Public Meeting in Cane Garden Bay, Tortola
20th October 2004	Meeting at the Office of the Commission
21st October 2004	Members Edison O'Neal and Chairman appeared on radio programme 'Umoja'
1st November 2004	Public Meeting in West End/Carrot Bay, Tortola
3rd November 2004	Meeting at the Office of the Commission
4th November 2004	Members Elihu Rhymer and Persia Stoutt appeared on radio programme 'Umoja'
17th November 2004	Meeting at the Office of the Commission, Ag. Commissioner of police and 4 inspectors of the Royal Virgin Islands Police Force.
24th November 2004	Meeting at the Office of the Commission
1st December 2004	Meeting at the Office of the Commission
4th December 2004	Public Meeting in St. Thomas, United States Virgin Islands
9th December 2004	Panel Discussion at H. Lavity Stoutt Community College, Paraquita Bay, Tortola
10th December 2004	Meeting in Conference room # 8 of the Central Administration Complex - Top Managers of the Civil Service.
15th December 2004	Meeting at the Office of the Commission
20th December 2004	Meeting at the Legislative Council Offices with the Legislature
21st December 2004	Meeting in Conference room # 8 of the Central Administration Complex - Top Managers of the Civil Service.
12th January 2005	Meeting at the Office of the Commission
19th January 2005	Meeting at the Office of the Commission
20th January 2005	Mass Public Meeting in Road Town, Tortola
26th January 2005	Meeting at the Office of the Commission
2nd February 2005	Meeting at the Office of the Commission
5th February 2005	Meeting at the Office of the Commission
9th February 2005	Meeting at the Office of the Commission

10th February 2005	**Meeting at the Office of the Commission**
16th February 2005	**Meeting at the Office of the Commission**
23rd February 2005	**Meeting at the Office of the Commission**
24th February 2005	**Meeting at the Office of the Commission**
25th February 2005	**Meeting at the Office of the Commission**

Appendix 9

REFERENCES

Address: *Wilton Park Conference on Britain and the Overseas Territories: Making the Partnership work. 25, Nov., 04.*

Antigua and Barbuda Constitution Order of 1981.

British Nationality Act, 1981.

Constitution Order of the Republic of South Africa, of 1996.

Constitution Order of the Republic of Trinidad and Tobago, of 1976, as amended by Act N.89 of 2000.

Department of Education, Government of the Virgin Islands.

Development Planning Unit, Government of the Virgin Islands.

Deverell, Corville, and Harvey de Costa. British Virgin Islands: *Report of the Constitutional Commissioners 1973*. London, HMSO, 1974.

Dookhan, Isaac. *A History of the British Virgin Islands...*

Durant, Will. *Lessons from History.*

FCO, *Partnership for Progress and Prosperity: Britain and the Overseas Territories (Cm 4264).* London, HMSO 1999.

Farara Q.C., Gerard, Terrance B. Lettsome, Walwyn E. Brewley, Edison O'Neal, Jennie Wheatley, Sheila George, and Andrew Fahie. Virgin Islands: *Report of the Committee to re-define Belonger Status 1997.* London, HMSO, 1997.

Fergus, Howard, Jean Kelsick, Florence Daley, Fitzroy Martin and Peter White. Montserrat: *Report of the Constitutional Commissioners 2002.* London, HMSO, 2003.

Financial Instructions of the Territory of the Virgin Islands.

Government of the Virgin Islands: Public Finance Management Act, No.2 of 2004.

Harrigan, Norwell, and Pearl Varlack. *The Virgin Islands Story.*

HMG, Anguilla Constitution Order 1982, as amended 1990.

HMG, Bermuda Constitution Order 1968.

HMG, Virgin Islands Constitution Order 1976 as amended 2000.

Immigration Department, Government of the Virgin Islands.

O'Neal, Joseph Reynold. *Life Notes.*

Passport Office, Government of the Virgin Islands.

Penn, H. R. *Memoirs of H.R. Penn.*

St. Lucia Constitution Order of 1978.

U.N., UNESCO, ref: E/Cn.4./Sub.2/L.566, 1982

Virgin Islands Audit Act, 2003.

Wallace, Walter, Howard Fergus and Alford Penn. British Virgin Islands: *Report of the Constitutional Commissioners 1993*. London, HMSO, 1994.