

3rd June 2020

Hon. Julian Willock
Speaker, House of Assembly
Richard Stoutt Buildig
Road Town Tortola
British Virgin Islands

RE: Request from the Honourable Speaker of the House of Assembly of the Virgin Islands

Dear Mr. Speaker,

We have been asked by the Honourable Speaker of the House of Assembly to provide an opinion on the following:

- i) whether or not the House of Assembly has the power to reprimand the Governor.
- ii) Whether such reprimand would be simply symbolic or whether the House can ask that the Governor be recalled.

Documents Reviewed

1. We have reviewed originals, copies, drafts or conformed copies of the following:

- 1.1 The Virgin Islands Constitution Order 2007
- 1.2 The Standing Orders of the Legislative Council (as amended)
- 1.3 Draft Resolution - House of Assembly of the Virgin Islands;
- 1.4 Letter dated April 28th addressed to His Excellency, the Governor Augustus Jaspert from the Speaker of the House, Julian Willock, MHA; and
- 1.5 Erksine May, on Parliamentary Practice 22nd & 24th Editions

Assumptions

2. The following opinion is given only as to, and based on, circumstances and matters of fact existing and known to us on the date of this opinion letter. The opinion only relate to the laws of the British Virgin Islands which are in force on the date of this opinion letter. In giving this following opinion we have relied (without further verification) upon the completeness and accuracy, as at the date of this opinion letter, of the Honourable Speaker's letter to His Excellency dated April 28th 2020.

Opinion

3. The above questions came about as a result of a motion put to the House of Assembly by the Honourable Julian Fraser, the Third District Representative. Essentially, the motion concerned a reprimand of the Governor for unduly delaying a special report to the House of Assembly on the notorious topic of BVI Airways.
4. In considering the above questions, it should be recognized from the outset that we are not aware that the questions raised have been answered before within the BVI's context or even the other Overseas Territories. Therefore, there is no clear judicial precedent on the subject.
5. The House of Assembly was created by sections 62 and 63 of the Virgin Islands Constitutional Order 2007 and is granted the power under section 78 to

“...introduce any Bill or propose any motion for debate in, or may present **any** petition to the House”.

Section 78 goes on to say that the mentioned items shall be debated and disposed of in accordance with the Standing Orders of the House. The word dispose, in this section, would in the context mean “deal with”, and the House of Assembly has a number of ways in which it deals with items such as motions and petitions, among those are:

- a) rejecting a debate on an item contained in a given order paper;
- b) approving the motion for debate in a given order paper;
- c) after debating a motion or petition, rejecting or approving it.

6. It is important to note the following from section 78. Firstly, the drafters of the Constitution were very specific, and purposefully decided not to limit the bills, motions and petitions that the House of Assembly may deal with. This is clear as the word “any” immediately precedes the word “bill”, the word “motion” and the word “petition”: **“...any member may introduce any Bill or propose any motion for debate in, or may present any petition to, the House...”**; *except on the recommendation of the Minister responsible for finance in the following circumstances; (See attachment)*

- i) *Where the motion, bill or petition would have a financial implication for “increasing any tax, for imposing or increasing any charge on the revenues or other funds of the Virgin Islands or for altering any such charge otherwise than by reducing it or for compounding or remitting any debt due to the Virgin Islands;”.*
- ii) The House **SHALL NOT** ... proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding in the House, is that provision would be made for any of the purposes mentioned in (i) above; except of course on the recommendation of the Minister responsible for Finance.

This motion does not fall under one of the exceptions stated above and hence we see no no reason why the resolution cannot be tabled

7. The duties of the House of Assembly are to make laws for the good governance of the BVI and further to hold the Executive branch accountable. In doing so, it may issue reprimands and admonishments (Erskine May). To an extent this view is supported by Erskine May paragraph 11.28 (*See attachment*) <https://erskinemay.parliament.uk/section/4557/reprimand-or-admonition/>). The House of Assembly may also direct that Ministers do certain things such as disclose legal advice, and hold the government in contempt for failure to abide by such resolutions Erskine May Paragraph 11.40 <https://erskinemay.parliament.uk/section/4569/ministerial-accountability-to-parliament/>.

8. The Office of the Governor in its current form was established by section 35 of the Virgin Islands Constitution. Section 35 also sets out that the powers and duties of the Governor are conferred by the Virgin Islands Constitution, the laws of the BVI and the Queen. Sections 2(4) and 46 essentially state that the Governor is the head of the Executive branch.

9. Although the Governor is the Queen’s representative, there are stark differences between the two institutions. One such difference is that unlike the Queen, the decisions of the Governor can be directly challenged in court. This point is illustrated by the fact that in ***R (Miller) v The Prime Minister*** and ***Cherry v Advocate General for Scotland*** ([2019] UKSC 41), the Claimants could only challenge the advice given to the

Queen by Prime Minister Boris Johnson on the prorogation of the House of Commons, rather than directly challenging the Queen's decision. However, the decisions of the Governor can be directly challenged, as seen in the BVI case of **Desmond Alphonso v the Attorney General BVIHCV2007/0185**, where the Governor's decision to deport the Claimant was indeed challenged.

9. There are however, similarities, such as the Governor being immune to law suits, criminal charges and the like. This is linked to the age old adage, "a King can do no wrong", however the title of "Governor" is not akin to king or queen, and thus a Governor can do wrong and his/her decisions, actions and or omissions may be challenged and may be subject to the jurisdiction of another branch of government, namely the Judiciary.
10. The officeholder of the Governor serves at the pleasure of Her Majesty. This means that only the Queen, through Her Majesty's government may remove the Governor from office. Indeed this also infers, that the Governor may only be punished by Her Majesty.

Analysis and Conclusions

11. The House of Assembly, is free to debate and deal with any motion in any way it feels fit, as long as it does not contravene the Oath of loyalty and allegiance to the Queen. Moreover, if the Governor's decisions, actions and omissions can be subject to proceedings in the judicature, surely, the Governor's decisions, actions and or omissions can be noted, commented on or discussed in the House of Assembly. It follows therefore, that the House of Assembly may issue a Resolution noting its disapproval of the Governor's actions. Formerly expressing disapproval in the House is tantamount to a reprimand.
12. The House of Assembly has no power to remove the Governor. This power lies solely with Her Majesty. However, the House of Assembly may pass a resolution noting its disagreement with or disapproval of the action or omissions of the Governor in Council; effectively reprimanding the Governor. Such Resolution may or may not ask for the Governor to be recalled. Members should however be mindful that treasonable or seditious language or a disrespectful use of Her Majesty's name is not permitted. In the past Members have not only been called out for such offences, but have been reprimanded, committed to the custody of the Seargent of Arms, or in the distant past even sent to the Tower.

<https://erskinemay.parliament.uk/section/4872/disloyal-or-disrespectful-reference-to-queen/?highlight=reprimand>

We advise accordingly.



DenJen Law