



# **REPORT ON THE DISCRETIONARY POWERS**

held by

Elected Public Officials

By Ms. Anthea Smith

## RECOMMENDATION A3

### Introduction

1. I have been commissioned by His Excellency the Governor to conduct an independent review of the discretionary powers held by elected public officials with a view to advising whether the discretionary powers should be removed where they are unnecessary or where they are considered necessary to ensuring that they are exercised in accordance with clearly expressed and published guidelines.
2. The scope of work outlined in the terms of reference is broken down into four (4) parts-
  - (a) Identifying the areas in which elected public officials have discretionary powers.
  - (b) Reviewing the areas identified to make an assessment of whether the discretionary powers are necessary or unnecessary.
  - (c) Advising on which discretionary powers should be removed and which should be maintained.
  - (d) Advising on what guidelines/practices should be implemented to ensure that discretionary powers should be delivered in a manner that contributes to good governance.
3. "Discretion" is the power to decide or act according to one's judgment. It is essential at the outset to establish the criterion on the basis of which the conferral of a discretionary power is determined to be necessary or unnecessary.

### Discretionary powers held by the Cabinet.

4. The executive authority of the Virgin Islands is vested in His Majesty: **Virgin Islands Constitution Section 46(1)**. Subject to the Constitution the executive authority of the Virgin Islands may be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him or her: **Virgin Islands Constitution Section 46(2)**
5. By **Section 47(3)** of The **Virgin Islands Constitution Order 2007** -

“...The Cabinet shall have responsibility for the formulation of policy, including directing the implementation of such policy, insofar as it relates to every aspect of government, except those matters for which the Governor has special responsibility under section 60... and the Cabinet shall be collectively responsible to the House of Assembly for such policies and their implementation.”
6. **Section 60** of the Constitution reserves for the Governor, subject to some qualifications and exceptions, responsibility for external affairs, defence, internal security, including the Police Force, the terms and conditions of service of persons holding or acting in public offices and administration of the courts.) Further, the Governor plays an important role in the functioning of the Cabinet. He or she forms part of a Cabinet Steering Group for the purpose of setting the agenda of the Cabinet, He or she is entitled, as is the premier, to inscribe items on the agenda or to convene a cabinet meeting if he or she so chooses. He or she normally presides over meetings of the Cabinet.

7. Essentially then, subject to the foregoing arrangements the Cabinet has overall responsibility for the formulation and implementation of policy concerning domestic affairs and to a limited extent concerning some regional matters. For such purposes the Cabinet is the mechanism of executive government and is, as a whole accountable to the legislature for its actions.
8. The responsibility conferred upon the Cabinet (“the formulation... and [direction]” of ... policy, insofar as it relates to every aspect of government”) is so broad that it is not practicable to place by reference to clearly expressed and published guidelines, any overriding prior limit on the scope of the powers available to it to discharge its constitutional responsibility. Further any provision which is intended to reduce the scope of the constitutional responsibility of Cabinet to set and implement domestic policy for the Territory is not only inconsistent with the role of the Cabinet as the policy making arm of the executive branch but would impinge upon the principle of self-government for the Territory.
9. It should, however, be pointed out that unlike the position in England where, due to the operation of the doctrine of sovereignty of Parliament, courts do not review legislation, and hence do not control the quantum of discretion bestowed on the administration by Parliament, the Territory has a written Constitution which enumerates fundamental Rights guaranteed by the Constitution to the people. This circumstance constitutes a limitation on the legislative and executive powers of the government, and, consequently, constitute an additional dimension of control over administrative discretion. Here the Court is able to review administrative discretion at the stage of conferral and is entitled to declare a provision unconstitutional if it seeks to confer too broad discretion on the administration or a minister without laying down any principle or policy to regulate its exercise.
10. The jurisdiction of the Courts to conduct judicial review extends to the exercise of discretion by the Cabinet in limited circumstances. The Cabinet is by **Section 47 (3) of the Constitution** collectively responsible only to the House of Assembly for its policies and their implementation. When, however, the Cabinet exercises a specific statutory function which, had it been conferred on a minister instead of the Cabinet, would unquestionably have been subject to judicial review, the Cabinet's exercise of the function is subject to judicial review to the same extent and on the same grounds as the Minister's would have been, see: Privy Council decision in **C.O. Williams Construction Ltd. v. Donald George Blackman and Another [1995] 1 W.L.R. 102**

### **Discretionary powers held by the Ministers of Government**

11. The Governor must assign to any Minister designated by the Premier for that purpose, responsibility for the conduct of any part of the business of the Government of the Territory other than such business as is by Section 60 of the Constitution reserved for the Governor. This includes the responsibility for the administration of any designated government department or departments.: **Virgin Islands Constitution Section 56(1) and (2)**. With such broad responsibility the Minister is necessarily vested with large discretionary powers.

12. Discretionary power is ordinarily vested in a Minister or administrator by the terms of a statute or by subsidiary legislation. Laws or regulations cannot fully foresee and adequately predict or anticipate all possible and plausible issues and events and even if they do, some situations might require completely a different approach and improvisation. Consequently, legislation conferring powers on the Minister or Administration is usually drafted in broad and general terms. This leaves the administrator free to exercise his power according to his own judgment.
13. Apart from the discretionary powers which are expressly conferred upon a decisionmaker by statute, there is the reality that in circumstances where the constitution, statutes or regulations do not succinctly express a course of action or inaction public officials are left with the freedom to make decisions among many options they deem fit ideally based on their “best” judgment. Put simply, a public official has discretion whenever the effective limits on his or her power leave him or her free to make a choice among possible courses of action or inaction.
14. Further, as is frequently the case, when a statute authorises the government or a Minister to make rules which it or he thinks expedient or necessary to carry-out the purposes of the Act, in effect, it confers a broad discretion on the government or Minister ( subject, of course to the doctrine of ‘Ultra Vires’) to decide what rules to make. The legislature gives very little if any guidance to the government as to what sort of rules to make under a specific statute.
15. When discretion is vested in a Minister or a high official, he or she has often to delegate the power to some official in a lower category, because it will be practically impossible for the Minister or the high official to take each and every decision by himself. This requires the Minister or administrator acting on his authority to translate somewhat vague legislative mandate into actionable goals and ‘real world’ outcomes. Consequently, the quest for and use of ministerial and even bureaucratic discretion is largely part of the life cycle of public administration.
16. Moreover, it is important that a necessary degree of discretion be given to public officials in order to promote innovation and managerial flexibility rather than having them operate in the discharge of their duties as mere cogs in the wheel of the administrative machinery. This must be seen against the background of the modern tendency towards increasing state regulation of human affairs. For the foregoing reason it is necessary to chart a course between inflexible legislative rules and wholly untrammelled ministerial discretion. This consideration must be taken into account in deciding what powers are unnecessary and in what circumstances they may be properly so regarded.

### **Discretionary powers held by the Members of the House of Assembly**

17. No statutory powers or discretions are accorded to individual members of the House of Assembly by virtue of them being Member. However, money is made available for distribution by Members of the House of Assembly and Ministries by way of discretionary “assistance grants”. Application may be made to individual members of the House of Assembly to use funds allocated to him or her to address the need of a constituent, and the Member, if he or she accedes to the application will send the application and any supporting documentation to the Clerk of the House as the relevant

Accounting Officer. Guidelines as to the process were described as 'scant' and 'grossly inadequate' and rarely enforced. In any event, as there is no requirement, on individual Members or otherwise, to disclose to whom, or otherwise how, the funds are distributed the effect of such guidelines, even if enforced would be negligible.

18. The report of the Commissioner dated 4 April 2022 on the British Virgin Islands Commission of Inquiry recommended that there should be a wholesale review of the BVI welfare benefits and grants system, including House of Assembly Members' Assistance Grants and Government Ministries' Assistance Grants. We are of the view that the outcome of such an exercise should be a comprehensive overriding Act setting out principles applicable and providing for transparency and accountability in relation to all programmes providing for Public Assistance grants, House of Assembly Members' Assistance Grants, Government Ministries' Assistance Grants and any other forms of public assistance.

#### **Constraints on the exercise of discretion by elected public officials.**

19. It must be noted that there is no discretion conferred by the legislature which is unfettered. Discretions have to be exercised for the purpose for which they were conferred. The position is as stated by Lord Bridge of Harwich in **Regina v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd. [1988] A.C. 858 at 872A to 873A**

"...My Lords, I start my consideration of the issue from a basic principle which I have found nowhere more clearly expressed and explained than by Professor Sir William Wade Q.C. in *Administrative Law*, 5th ed. (1982), pp. 355-356 in the chapter entitled "Abuse of Discretion and under the general heading "The Principle of Reasonableness." After quoting from authorities going back to *Rooke's Case* (1598) 5 Co. Rep. 99b, the author introduces a new subheading "No unfettered discretion in public law" and writes, at pp. 355-356, 357:

" The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.... Unreviewable

administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what the scope of judicial review is. But that there are legal limits to every power is axiomatic."

As the author points out under the next subheading "Judicial rejection of unfettered discretion," the application of the basic principle is vividly illustrated by the decision of this House in **Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997** . Under the Agricultural Marketing Act 1958 the Minister had a discretion, which on the face of the statutory language was unlimited, to refer certain complaints to a committee of investigation. The headnote accurately summarises the effect of the decision as follows, at p. 998:

"Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to \*873 be determined by the construction of the Act; this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere."

And at **Page 873 F to G**

"...Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose".

20. In this connection the effect of **Section 56. (6) of the Virgin Islands Constitution Order 2007** is to require that a Minister assigned responsibility for the conduct of any business of the Government, including responsibility for the administration of any department of government, must exercise his or her responsibility in accordance with the policies of the Government as determined by the Cabinet and in accordance with the collective responsibility of the members of the Cabinet for the policies and decisions of the Government.

## Judicial review

21. All powers conferred upon the executive are capable of abuse. Without proper checks, monitoring and accountability administrative or Ministerial discretion will lead to arbitrary exercise of power. The process of judicial review is an important procedure whereby members of the public may challenge the legality of the exercise of a discretionary power by elected public officials. Upon the hearing of such a challenge it is not only the power but the duty of the Courts to see that discretionary powers are not abused and the administration exercises them properly, responsibly and with a view to doing what is best in the public interest. The power to prevent such abuse is the acid test of effective judicial review.

22. It is suggested that the process of judicial review be set out in an Administrative Justice Act modelled on the Administrative Justice Act of Barbados. That Act mandates a procedure whereby, subject to specific exceptions, an overriding statutory obligation is placed upon any person or body making an administrative or ministerial decision, if requested by any person adversely affected thereby, to supply to that person a written statement of the reasons for the decision within a reasonable time of the request.
23. The procedure of judicial review of administrative action is concerned not with whether a decision by a Minister or public official is 'correct' in the eyes of the law but rather with whether the process by which it was arrived at is just and fair. Accordingly, an exercise of discretionary power can be challenged on the ground of illegality, irrationality, procedural impropriety or proportionality but a Court will not interfere if the decision is unimpeachable on those grounds.

#### **Circumstances in which discretionary powers may be regarded as unnecessary.**

24. In our view where discretionary powers have been conferred upon a Minister or other public official by statute those powers must be taken to have been conferred upon the relevant official because the legislature has determined such powers to be necessary for achieving the objects for which the statute was passed. Such powers can be described as unnecessary only to the extent that even if exercised in good faith and for a proper purpose, they exceed those powers which may be required to achieve the policy and objects of the relevant legislation.
25. On this premise we have examined the discretionary powers conferred upon elected public officials in the legislation which have been provided to us for review.

#### **Conclusions**

26. We have concluded after review of the enactments that in general the discretionary powers conferred upon elected public officials in the legislation reviewed are necessary, appropriate and not overly broad or excessive. A very small number of provisions in a few enactments have been identified as giving rise to the possibility of challenge by way of constitutional motion. These include:
  - (a) **Section 57(2) of the Social Security (Employment Injury Benefits) Regulations.** That provision entitles the Minister to remove the chairman or any member of the Medical Appeals Tribunal at any time without the requirement to assign any reason therefor and without any other type of restraint on the exercise of the power. This potentially compromises the independence of the tribunal because the Tribunal performs an adjudicatory function.
  - (b) **Section 175(3) of the Public Finance Management Regulations 2005** provides for Cabinet exercise a discretion to accept or reject the recommendation of the Central Tenders Board. There is no guidance as to the criteria which Cabinet should take into account in exercising its discretion in relation to the recommendations of the Central Tenders Board or as to the

circumstances in which it may order a waiver of the tender process. Since this decision involves the use of a statutory power, it is subject to judicial review.

(c) Section 28 (3) Virgin Islands Investment Act, 2020 empowers the Minister on the advice of the Commission to delay or prevent a foreign investor from transferring funds outside of the Territory with a view to preventing movements of capital that cause or threaten to cause serious difficulties for macroeconomic management of the economy. It is to be noted that Section 25 of the Constitution of the Virgin Islands confers protection from deprivation of any “interest in or right to or over property of any description” except in certain listed circumstances, not that deprivation for the purpose of preventing movements of capital for the safeguarding of the local economy is not included in that list.

27. The greater problem in our view is that in a few areas of government statutes or regulations do not clearly delineate a course of action and thus place little effective limit on the ability of public officials to act according to their inclinations without sufficient regard to the principles of good government. In this regard the report of the Commissioner dated 4 April 2022 on the British Virgin Islands Commission of Inquiry recommended that there should be a wholesale review of processes for the disposal of Crown Land, to ensure that such disposals are the subject of an open and transparent process. In other cases, even where legislation plainly sets out policy objectives and clear and principled approaches to the achievement of the same elected representatives may ignore or bypass the same. This gives rise to questions of enforcement and also requires supplemental legislation to provide clarity as to the purpose which the discretion is intended to serve and guidelines for the exercise of discretion for the achievement of that purpose.
28. A compilation of the enactments in which elected public officials have been granted discretionary powers and our assessment of whether the discretionary powers so granted are necessary or unnecessary or should be retained or removed is attached.

**REVIEWERS:**

**Anthea L. Smith**

**Sydney A. Bennett KC**

**28 February 2023**