**VI DOJ'S PROPOSED AMENDMENTS TO V.I.C.**

As requested, please see areas of the Virgin Islands Code (V.I.C.) that require amendment or updating for consideration during the planned symposium by the Legislature's Committee on Rules and Judiciary. The Virgin Islands Department of Justice, Office of the Attorney General (VI DOJ) recognizes that this is but a first step and, as such, submit this brief summary. It is our hope that the working group will use the opportunity, at the appropriate time, to reach out to VI DOJ for specific proposed legislative language that would address the areas noted.

**CRIMINAL**

5 V.I.C. § 3711(a). Suspension of sentence and probation

ISSUE— The code section makes a "split sentence" illegal in the Virgin Islands, that is, any criminal defendant who is sentenced to more than 6 months incarceration is *barred* by this statute from being assigned probation. This prohibition creates numerous unfortunate side effects for the community and distorts the justice system. For example, there are some defendants whose crime of violence may warrant more than 6 months incarceration, but the defendant would clearly benefit from probation as he transitions back into society. Monthly check-ins while on probation have great positive benefits to the community with minimal cost (as opposed to the great cost of incarceration). A probation officer can establish a positive pattern with a defendant in which s/he is regularly employed, clean and off-drugs, completes further education (GED) or anger management treatment, or takes medications as prescribed. 14 V.I.C. §3711(a) prohibits this transition back into productive society if a defendant served more than 6 months. The code section is inconsistent with sentencing statutes in other jurisdictions.

PROPOSED AMENDMENT— Strike the language preventing probation from being ordered by the Court in cases in which defendant is incarcerated longer than 6 months.

23 V.I.C. §481(a). Identifying Marks on Weapons

ISSUE— 23 V.I.C. 481(a) makes possession of a firearm with an obliterated serial number a criminal act. Under this VI statute, this requires active alteration or removal of an existing serial number on the weapon. The issue faced by officers on the street is that the "ghost guns" now entering the Territory are manufactured *without* a serial number. Thus, the obliterated serial number statute in the Virgin Islands does not criminalize possession of a ghost gun, even though it is similarly an 'untraceable' firearm.

PROPOSED AMENDMENT— Add one sentence to 481(a) making it illegal to possess a firearm without a serial number in the Virgin Islands.

14 V.I.C. §298. Aggravated Assault

ISSUE— 14 V.I.C. § 298(5) (enhanced penalty for male striking female) has been held unconstitutional by the VI Supreme Court (there cannot be an enhanced penalty based upon gender).

*The section of the aggravated assault statute providing that any assault committed by a male upon a female is automatically aggravated in nature violates the Equal Protection Clause, and it was plain error to convict defendant of that charge. Even if it was enacted with the objective of providing greater protections to women who are attacked by physically stronger men, because the statute fails to take into account the relative physical prowess of the attacker and the victim, it cannot be said that the discriminatory means employed are substantially related to the achievement of those objectives. Webster v. People of the Virgin Islands, 60 V.I. 666, 2014 V.I. Supreme LEXIS 22 (VI. 2014).*

*Offending portion of 14 V.I.C. § 298(5) which reads, "being an adult male, upon the person of a female" does not satisfy the "intermediate" or "heightened" judicial standard of equal protection review. Accordingly, that offending portion of § 298(5) must be stricken and deemed unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. People of the Virgin Islands v. McGowan, 2012 V.I. LEXIS 4 (Jan. 11, 2012).*

PROPOSED AMENDMENT— Strike paragraph 5 to comply with VI Supreme Court caselaw and U.S. constitutional principles.

ISSUE - This section lists special groups – like police, the elderly, judges – that society believes should get additional protection. However, the penalty is still a misdemeanor and really has no teeth.

PROPOSED AMENDMENT - All of the crimes enumerated under this statute should be 5-year felonies. The list should also include pregnant women, prosecutors and public defenders.

14 V.I.C. §2253(a). Possession of an Unlicensed Firearm

ISSUE— 14 V.I.C. 2253(a) cites to 23 V.I.C. 451(f) for the definition of firearm. This becomes an element required to be proven at trial beyond a reasonable doubt, i.e., in a possession of firearm case, the People must prove "operability." The issue arises when a firearm has been damaged (e.g., the firing pin damaged or lost when the gun was thrown and it no longer test fires, or the gun rusted to inoperability by exposure to salt water and no longer test fires). As a result, a defendant was in possession of a firearm, but because of a technicality, the case fails.

PROPOSED AMENDMENT— Mirror federal firearms definitions by amending T. 23 V.I.C. §451(f) to include the words: "which will, or is designed to, or may readily be converted or restored to expel a projectile" or similar. This "may be restored to operability" definition would then encompass both operable firearms, but also those that were disassembled or altered in such a way as to be inoperable at the time of the test fire performed by law enforcement.

ISSUE— Lack of clarity in sentence. The legislative intent with respect to *sentencing* for possession an unlicensed firearm is unclear. In black and white, the statute 14 V.I.C. 2253(a) reads that possession of an unlicensed firearm "*shall be* sentenced to imprisonment of *not less than ten years*…" The Courts, however, have interpreted this as a non-mandatory sentence, and routinely sentence a defendant in possession of an unlicensed gun to all suspended time. This is happening because 14 V.I.C. §2254(b) reads that any person convicted pursuant to 2253(a)…during the commission or attempted commission of a crime of violence… sentence shall not be suspended…

*nor shall such person be eligible for probation*…". Thus 2253(a) possession (despite stating "*shall be* sentenced to imprisonment of *not less than ten years*…") is treated as non-mandatory time (because it is not referenced with the "nor shall be eligible for parole" language) , whereas 2253(a) possession by felon/crime of violence is treated as a mandatory 15 years to serve, with no time suspended.

PROPOSED AMENDMENT— If the Legislature wishes to criminalize possession of an unlicensed firearm with a mandatory sentence of incarceration, which the language in 2253(a) seems to indicate ("*shall be* sentenced to imprisonment of *not less than ten years*…" ), 2254(b) will have to be amended to add "possession of an unlicensed firearm" to the offenses in which "sentence shall not be suspended… *nor shall such person be eligible for probation*…". In addition, the Legislature could also create a non-mandatory "first offender" sentence for defendants deemed appropriate by the Attorney General and the Court (i.e., those with no prior contact with law enforcement who possessed a firearm, not during a crime of violence).

14 V.I.C. § 297(b). Assault in the Third Degree (on a Law Enforcement Officer)

ISSUE— Part (b) of the Assault 3d code section is a penalty enhancer designed to protect police officers. Part (b), however, requires that an officer must be engaged "in the lawful discharge of the duties of his office" for the penalty enhancement to take effect. This creates a dangerous situation in which an officer who made a prior arrest of a dangerous defendant could later be attacked while off duty by that defendant. Such an assailant, who targeted the officer with a weapon because he knew him to be law enforcement, would not qualify for the enhanced penalty due to a technicality in the law (*i.e. a suspect can know the victim to be a law enforcement officer, attack him for the prior performance of his law enforcement duties, but because the officer's shift was over, the enhanced penalty would not apply*).

PROPOSED AMENDMENT— Strike the language "in the lawful discharge of the duties of his office…" and "discharging an official duty." The statute still requires it be "known or should have known" by the suspect the victim was a peace officer.

14 V.I.C. § 292. Assault and battery defined

ISSUE - Whoever uses any unlawful violence upon the person of another with *intent to injure* him, whatever be the means or the degree of violence used, commits an assault and battery.

PROPOSED AMENDMENT - The "intent to injure" portion should be stricken. In fact, the focus should not be on what the actor intended, but upon its effect on the victim. Ideally, a battery should be any intentional physical contact that is unwanted or harmful to the victim. For example, we had a defendant hold and squeeze a victim's wrists in order to "detain" her. Both wrists were bruised. Probable cause was not found because we couldn't show the defendant "intended to harm" his victim.

14 V.I.C. § 1051. False imprisonment and kidnapping

ISSUE - Whoever without lawful authority confines or imprisons another person within this Territory against his will, or confines or inveigles or kidnaps another person, with intent to cause

him to be confined or imprisoned in this Territory against his will, or to cause him to be sent out of this Territory against his will; and whoever willfully and knowingly sells, or in any manner transfers, for any term, the services or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this Territory to any other state, territory or country, is guilty of kidnapping and shall be imprisoned for not less than one and not more than 20 years. This action shall not apply in any case when a parent abducts his own child.

PROPOSED AMENDMENT - This is an extremely poorly written statute. Judges are unclear whether it applies to just kidnapping, or just false imprisonment, or whether you have to prove both because of the conjunctive "and."

14 V.I.C. § 1052. Kidnapping for ransom, extortion, robbery or rape

ISSUE - This statute is poorly written and, as a result, unclear.

PROPOSED AMENDMENT – This statute needs to be completely rewritten.

Chapter 85: Rape and Related offenses

This entire chapter should be rewritten to be more clear.

Additionally, the affirmative defense for aggravated rape offered in 14V.I.C. § 1700(f) ("spousal consent shall be an affirmative defense in the event the persons are legally married pursuant to the provisions of title 16, chapter 1 of the Virgin Islands Code"). Now that the age of consent in the VI is 18, that defense is no longer relevant.

**CIVIL**

PREJUDGMENT INTEREST AGAINST THE GOVERNMENT

ISSUE - In the past, the Court routinely determined that prejudgment interest could not be charged to the Government in civil cases, as a result of the apparent preclusion in Title 5, section 426 of the V.I.C. However, the VI Supreme Court issued a ruling in 2022 that determined that 5 V.I.C. 426(b), in fact, did not ban all prejudgment interest against the Government. See Vlaun v. Briscoe, 2022 V.I. Supreme LEXIS 23 (Sep. 6, 2022). Rather, the Court held that Section 426 banned only prejudgment interest in judgments. The Court looked to 11 V.I.C. 951(a), however, to determine that the Government is subject to 9% interest for failure to pay monies due under a contract. *Vlaun*, Supreme LEXIS at *14. This now means that we must pay prejudgment interest in cases where we enter into settlement agreements.

PROPOSED AMENDMENT – Section 426 needs to be amended to make it clear that the Government is not subject to prejudgment interest under any circumstances. (Alternatively, such interest must be capped at 4% rather than the statutory rate of 9%).

SENIOR STITTING JUDGE STATUS – USURPATION OF APPOINTMENT AND CONFIRMATION POWER OF THE GOVERNOR AND THE LEGISLATURE

ISSUE – Title 4, Section 74a of the V.I.C. erodes and eviscerates the Governor's power to appoint and the Legislature's power to confirm judges, by empowering the Chief Justice to seat former

judges to serve as Senior Sitting judges. The Court is presently construing Section 74a as a power to seat a former judge (or retain judges that were rejected for reappointment) to the Court on a full time and permanent/semi-permanent basis, to manage an entire case docket (rather than isolated matters, to be paid on a per diem basis). In sum, judges who were not appointed and confirmed through the normal process, are being seated to the Court by the judiciary itself. This usurps the Governors appointment power and the Legislature's important confirmation powers.

PROPOSED AMENDMENT – Section 74a should thus be repealed and replace with language that expressly precludes any person from sitting as a judge or senior sitting judge, except for a *pro tem* appointment is required to hear a specific case where every duly appointed judge on the Court is conflicted and has recused.

## AMENDMENTS TO THE VIRGIN ISLANDS TORT CLAIMS ACT

ISSUE – There are significant amendments required to be made to the VI Tort Claims Act (VITCA), in order to bring clarity to a number of interpretive issues and to better balance the need to protect the Government's interest while providing a remedy to persons who suffer harm. One avenue would be to adopt amendments to bring the VITCA closer in line with the Federal Tort Claims Act. A significant change in an area that is causing a lot of questions, and which could potentially result in VITCA's notice requirement not being upheld as a jurisdictional bar, is the good cause requirement for filing late notices.

PROPOSED AMENDMENT - That good cause requirement should be altogether repealed. The statute should be further amended to require that claimants demand a sum certain within 90 days; that the extension for filing notices of intent or claims be repealed and, as noted, the good cause requirement be repealed.

*Other areas where amendments should be considered are*: Extending immunity for government employees under . VITCA to correspond with the broader immunity afforded to federal employees under the FTCA; mandating a rel. e of liability as to the Government where an employee who was the tortfeasor (for acts done during scope of employment), settles privately with the victim; adding a definition of scope of employment; adding a clear provision that provides for automatic substitution of the Government as a defendant, in place of an employee who is sued in his/her individual capacity for suits arising from acts occurring in the scope of employment. Finally, an important addition required to the statute is specific language that makes it clear that the notice requirement applies to all claims, whether or not the government is liable and whether or not negligence or gross negligence of an employee is claimed.

Similarly, for Administrative Tort claims brought pursuant to section 3402 or 3406 of the VITCA, an amendment is needed to expressly preclude recovery for damage from potholes, fallen trees or portions of trees, acts of God, etc.

## AG'S AUTHORITY AND EXPRESS POWER TO APPOINT /DESIGNATE COUNSEL

ISSUE - Recently, VI DOJ has been getting challenges (now in 7 cases) to disqualify outside counsel (whether by pro hac vice admission or special admission) from appearing in cases with the AAG to represent the GVI. We are pushing back.

PROPOSED AMENDMENT - 3 V.I.C. 114 could be amended to specifically provide for the GVI to be represented by outside counsel as well, who are specially designated by the Attorney General.

Additionally, Title 3, Section 114 should be further amended to clarify the limits of the Attorney General's authority of representation. That statute currently provides that the AG represents only the Executive Branch; however , in light of recent challenges, further clarification is required to specify that the AG represents only the executive branch and does not represent any other branch of government .

Further, Title 19, Section 245(d) (and any other provision that permits an autonomous or semi-autonomous entity of the Executive Branch to request or receive representation from the Attorney General) should be amended to leave to the Attorney General's discretion whether to grant such representation.

## IMMUNITY OF PUBLIC BOARD MEMBERS

ISSUE - The code should be amended to expressly make clear that all members of all public boards, have absolute immunity from any liability and legal actions for acts taken within the scope of their membership/employment on such board (similar to the hospital board).

PROPOSED AMENDMENT - In VITCA, define claims to include acts by employees, representatives and agents of GVI and its instrumentalities, including persons serving on boards.

## MEDICAL MALPRACTICE (Title 19)

There are significant amendments required to the Medical Malpractice Act (MMA). VI DOJ stands ready to provide specific areas of concern. Some required amendments include inclusion/amendment of "Expert" definition, adoption of added provisions that mimic other state statutes, and imposing a lower cap on liability.

## MINOR PERMITS - DEFAULT

ISSUE - Under the V.I.C. presently, the failure of DPNR and/or related bodies to act on an application for a minor CZM permit within 15 days results in a grant of such permit by default. This injures the community and permits unplanned and unregulated development, due solely to the inability or failure of a government employee to act (within what is already a very short timeline).

PROPOSED AMENDMENT - A middle ground needs to be identified; perhaps the deadline for agency action could be extended from 15 to 90 days, and/or by providing the right to administrative review (perhaps by the commissioner) if a permit application is not decided within the requisite time period.

## PROPERTY TAX

ISSUE - The Code provisions for property taxes needs to define what it means to "escape taxation."

Additionally, in Title 33, where a property tax sale declared void after certificate of purchase, the statute needs to provide a mechanism to nullify a Certificate of Purchase in the public record, to give due notice to any later bonafide purchasers. (i.e. the statute may require that the Lieutenant Governor shall file a notice of record which shall operate as notice that title has not been transferred and that any certificate of purchase issued pursuant to a tax sale is void).

Finally, the statute should provide for a purchaser to be afforded notice and opportunity to be heard when a notice of cancellation of tax sale or cancellate of certificate of purchase is issued.

### ACQUISITION REGULATION

V.I.C. should mirror the Federal Acquisition Regulation.

### TAX CODE

The V.I.C. internal revenue tax provisions should be amended to mirror the most recent version of the federal Internal Revenue Code. Many of these provisions in the V.I.C. are outdated and only mirror the previous version of the IRC.

## FAMILY

### TRANSFERRED YOUTH IN CUSTODY

ISSUE – We need to come into compliance with federal law regarding transferred youth in custody. Title 5 V.I.C. § 2095(g) mandates that if a motion to transfer a juvenile from family court to adult court is granted and a child offender is detained, that he "shall" be placed in the custody of the Bureau of Corrections, and that this pre-trial detention be separate and apart from the adult inmate population. Interestingly, once a child has been transferred from the Family Division to adult court and convicted, they may be "sentenced or committed to the custody of the Youth Services Administration until the child reaches his eighteenth birthday and then be transferred to the Bureau of Corrections to serve the remainder of the sentence, if any." 5 V.I.C. § 2526(a).

The law, as it stands in the USVI, requires juveniles who have been transferred but not yet convicted to be held at the Bureau of Corrections, in violation of federal law. However, juveniles who have been transferred and subsequently convicted in adult court may go back to the YRC until they turn 18. On December 21, 2018, the President signed the Juvenile Justice Reform Act of 2018 into law, amending the Juvenile Justice Delinquency Prevention Act. H.R. 6964. Previously the JJDPA only prevented minors facing delinquency charges from being held in adult jails, leaving youth charged as adults vulnerable to the dangers and shortcomings of adult jails, a system not designed for youth, nor for their safety. Under the reauthorized statute, youth held in adult jails – including those charged as adults – must be removed to juvenile detention centers by December 21, 2021. The one exception is when a court holds a hearing and finds that keeping a minor in an adult facility is "in the interest of justice."

To determine whether detaining a youth in an adult jail is in the interest of justice, the court must weigh seven factors: (1) the person's age; (2) their physical and mental maturity; (3) their present mental state, including whether they present an imminent risk of self-harm; (4) the nature and circumstances of the charges; (5) the youth's history of delinquency; (6) the relative ability of the

available adult and juvenile facilities to both meet the needs of the individual but to protect the public and other youth in their custody and (7) "any other relevant factor." If the court concludes that the balance of these factors points in favor of detaining the youth in an adult facility, the court must hold a hearing once every 30 days (45 days in a rural jurisdiction) to review whether the placement in an adult jail is still in the best interest of justice. Furthermore, even when it is in the interest of justice, the youth cannot be held in an adult facility for more than 180 days total, unless the court finds good cause for an extension, or the youth waives the 180-day maximum. Youth who are held in adult facilities under the interest of justice exception will still be protected by the Prison Rape Elimination Act's (PREA) Youthful Inmates provision, which guarantees sight and sound separation between adult inmates and inmates under 18 years of age.

The law in the USVI has not caught up to the federal JJDPA. Within the past year, St. Croix has housed two transferred juveniles at the Bureau of Corrections. Not only is this in contradiction to federal law, but it is also inconsistent with our Children's Policy as well as accepted practice in every other jurisdiction. It is not in the best interest of most juveniles or the community, as it promotes criminal behavior when the child is eventually released back into the community.

## CRITERIA FOR DETENTION STATUTE (5 V.I.C. § 2514)

ISSUE – The criteria for detention statute must be changed (5 V.I.C. 2514). At the moment, the statute extremely limits police ability to place a juvenile at the Youth Rehabilitation Center prior to a court hearing. This is especially harmful when dealing with domestic violence cases that do not rise to the level of felonies and other cases that may not be the super serious crimes listed in the statute but still pose a danger to the community. The police should not be limited by any offense list as long as there is a requirement for a detention hearing within a short period of time. The focus should be on the juvenile's situation and NOT on the specific offense. In addition, the specific "detention hearing" statute should be added so that the court has clear guidelines to base further detention on. Texas Family Code 52.01 is a great example, as it allows a child to be taken into custody for any delinquent conduct or conduct that violates a condition of probation imposed by the family court. Section 53.02 designates the circumstances in which the child may be held prior to hearing. These guidelines are not based on the offense, but rather on the child's circumstances: *A child taken into custody may be detained prior to hearing on the petition only if:*

1. *The child is likely to abscond or be removed from the jurisdiction of the court;*
2. *Suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodia, or other person;*
3. *The child has no parent, guardian, custodian, or other person able to return the child to the court when required;*
4. *The child may be dangerous to himself or herself or the child may threaten the safety of the public if released;*
5. *The child has previously been found to be a delinquent child or has previously been convicted of an act that would be a felony if committed by an adult and is likely to commit an offense if released; or*

6. *The child's detention is required by subsection (f).*

*Note that subsection (f) would be very helpful here: A child who is alleged to have engaged in delinquent conduct and to have used, possessed, or exhibited a firearm in the commission of the offense* ***shall*** *be detained until the child is released at the direction of the judge of the juvenile court or until a detention hearing is held as required by Section 54.01.*

A detention hearing (which is similar to our advice hearings) is then required to be held promptly, but not later than the second working day after the child is taken into custody (provided, however, that when a child is detained on a Friday or Saturday, then such detention hearing shall be held on the first working day after the child is taken into custody). *Note that another jurisdiction says that a juvenile taken into custody shall be released to their parent unless that is contrary to the welfare of society or the juvenile. The Texas statute is preferred because the guidelines are clear, but either way the focus is on the juvenile's situation and NOT on the specific offense.

NOTIFICATION TO SCHOOLS

ISSUE – The V.I.C. needs a statute regarding notification to schools.

For example, in Texas the onus is put on the police department at the time of arrest and then on the prosecutor's office upon resolution of the case. That way, the school knows when it first happens and then gets a follow up as to what the result of the case is. This is extremely important so that the school can act appropriately for the safety of all of the students. (Here is a link to the language from the Texas statute: https://codes.findlaw.com/tx/code-of-criminal-procedure/crim-ptx-crim-pro-art-15-27/) While the Virgin Islands are small island communities and notification may be a double-edged sword, the Texas statute is very specific as to the confidentiality of these notices. Currently, we are constrained to the point that we cannot have meaningful communication with the schools when it is necessary. That is being somewhat mitigated because a representative from the Department of Education has attended some hearings recently; however, legally it is questionable whether they should be allowed and if the defense ever makes an issue of it, there will not be any grounds to stand on.

COMPLAINTS; PRELIMINARY INQUIRY; AUTHORIZATION TO FILE

ISSUE – 5 V.I.C. 2510 needs to be amended to remove the provision requiring that complaints be 'verified' and countersigned by the Attorney General.

This limits prosecutorial discretion in filing juvenile complaints (i.e., if the police department for some reason decided not to sign the verification, the court would dismiss the complaint). The statute also states that "decisions of the Attorney General on whether to file a complaint shall be final," but the family court judge on St. Croix will not accept a juvenile complaint/petition without a verification signature from VIPD. Other jurisdictions do not require a signature from anyone other than the prosecutor on a juvenile complaint/petition.

**MEDICAID FRAUD CONTROL UNIT (MFCU)**

34 V.I.C. §§ 682, 683

ISSUE – Revisions are necessary to provide for the following:

1. include actions prosecuted under the Virgin Islands False Claims Act, which has been revised as well;
2. provide for a legal mechanism by which monies recouped by the MFCU or VI DOJ can be shared between the MFCU and the Medicaid Program (currently the statute does not offer one);
3. include certain language in the statute so that the local statute is consistent with its federal counterpart; and,
4. clearly delineate the source of funding for the Revolving Fund and limit the use of the money within the fund to operational expenses of the MFCU.

PROPOSED AMENDMENT – Redlined copies of the statutes with proposed revisions are attached.

Virgin Islands False Claims Act

ISSUE - The Virgin Islands False Claims Act, which is based on the Federal False Claims Act, has not been revised since it was enacted in 2014. However, the Federal False Claims Act has since been revised.

PROPOSED AMENDMENT – A redlined copy of the VI False Claims Act with proposed revisions is attached. The suggested revisions are meant to capture the revisions made to the Federal False Claims Act.

BONUS - In addition to updating the statute, a revised VI False Claims Act, if approved by the United States Department of Health and Human Services, Office of General Counsel, will allow the Territory to keep an additional 10 percent of all Medicaid dollars collected under the statute.

Finally, as a general rule, it would be wonderful if the statutes could follow a uniform numbering plan (i.e., subsections are numbered and sub-subsections are lettered). The numbering system is currently random throughout.