

External Legal Advisory Group

Advice on the Implementation of the BICI Institutional Recommendations

1. On receipt of the Report of the Bahrain Independent Commission of Inquiry (BICI), His Majesty King Hamad bin Isa Al Khalifa (HM King Hamad) committed the Government of Bahrain (GoB) to “reform our laws so that they are consistent with international standards to which Bahrain is committed by treaties”. To assist and advise it in this task, the GoB appointed a number of independent legal experts as follows:

- Sir Daniel Bethlehem QC, an expert in international law and a former principal Legal Adviser of the United Kingdom Foreign & Commonwealth Office;
- Sir Jeffrey Jowell QC, an expert in constitutional and public law and the Director of the London-based Bingham Centre on the Rule of Law;
- Professor Adnan Amkhan Bayno, an expert in Arab, Islamic and comparative international law and former principal Legal Counsel to the Energy Charter Secretariat;
- Professor Sarah Cleveland, an expert in international human rights law and Professor of Human and Constitutional Rights at Columbia Law School in New York;
- David Perry QC, an expert in criminal and public order law at the London Bar with experience in inquiries and legal issues concerning the oversight of law enforcement and intelligence agencies.

2. The external legal advisory group was asked to advise on the interpretation and implementation of the recommendations in paragraphs 1716, 1717, 1718 (second sentence), 1722(a), 1722(b), 1722(d) and 1722(f) of the BICI Report. These are the recommendations that concern the establishment, working methods and training of the independent and impartial bodies that are to have responsibility for the investigation of allegations of the unlawful conduct identified in the BICI Report and the continuing responsibility to ensure compliance with human rights standards in the future. For ease of reference, we refer to these recommendations as the BICI institutional recommendations.

3. We have approached our advisory task through the prism of the BICI Report, proceeding on the basis of the findings, conclusions and recommendations set out therein. The recommendations made in the Report are extensive, ranging from elements that have required immediate attention to those of a longer-term nature, such as training of the public prosecution and the judiciary. The issues on which we have been asked to advise span the spectrum, insofar as they require institutional changes that must be affected quickly but should also be enduring in character. We have approached our task with this in mind, and the intention, where possible, of proposing approaches to implementation that will provide a solid foundation on which such further institutional changes as may in due course be appropriate can be made.

4. While we have proceeded on the basis of the BICI Report, we have nonetheless familiarised ourselves at a level of detail with the legal and institutional framework in Bahrain relevant to our task. Members of the group have had extensive discussions with the principal GoB Ministers, and their senior officials, who have responsibility for BICI implementation issues. We have also worked closely on aspects of our intersecting tasks with John Timoney and John Yates, who have been asked to advise and assist the Ministry of the Interior and the Police in respect of the implementation of the BICI recommendations that are specific to them.

5. In the final stages of the preparation of our advice, two of our number, Daniel Bethlehem and Adnan Amkhan Bayno, had the opportunity to discuss the principal elements of our advice with Professor Cherif Bassiouni.

6. Our principal advice and recommendations are set out below, divided into two parts: (a) general principles relevant to the interpretation of the BICI institutional recommendations; and (b) the interpretation of the specific recommendations in question.

General Principles of Interpretation

7. The BICI institutional recommendations must be interpreted and implemented in the light of Bahrain's international human rights obligations, including as set out in the principal human rights treaties to which Bahrain is a party. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Arab Charter on Human Rights (Arab Charter), and various standard-setting conventions of the International Labour Organisation.

8. With regard to the implementation of the BICI institutional recommendations, those binding treaty commitments that are particularly pertinent are the ICCPR, the Convention Against Torture, and the Arab Charter, although other binding instruments will also be relevant, as will also various non-binding but nonetheless standard-setting texts. These include, most notably the Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Effective Prevention and Investigation Principles) and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles).

9. By reference to international law, the following principles of general application are the core principles required of bodies that are responsible for the investigation of alleged human rights abuses and for on-going monitoring and oversight to ensure that such abuses do not occur in the future:¹

- (a) such bodies must be provided with the authority and resources to enable them to fulfil their mandate;
- (b) they must be independent and impartial, in the sense that they must be fully independent of those they are investigating and there must be no personal or institutional bias or appearance of bias;
- (c) they must have autonomy of action and must be capable of acting, and must act, on their own authority once a matter has been brought to their attention;
- (d) they must have the expertise necessary to carry out their tasks;
- (e) there must be an element of objective public scrutiny and transparency in the investigations process;

¹ We emphasise that the principles set out in this paragraph are core principles of general application but are not the only principles that will be relevant for these purposes. Careful regard will also have to be had to both the Effective Prevention and Investigation Principles and the Istanbul Principles noted in paragraph 8.

- (f) the victims, next-of-kin or other complainants must be afforded a meaningful opportunity to participate in the process;
- (g) the process must be capable of securing accountability;
- (h) investigations must be prompt and expeditious; and
- (i) the State must cooperate and provide the investigation with facts that are within its knowledge.

Interpretation and Implementation of the BICI Institutional Recommendations

10. **Paragraph 1716** recommends the establishment of “a national independent and impartial mechanism to determine accountability”. While this is not necessarily the exclusive focus of the recommendation, this recommendation seems to us to be concerned principally with establishing accountability for the conduct that was the subject of the BICI investigation, ie, conduct that has already occurred. This is consistent with the language of the paragraph as well as with the paragraphs in the body of the BICI Report from which it was drawn, in particular paragraphs 890 – 892 and 1246. It is also consistent with the analysis and conclusions of the Report that indicates that there was not an adequate, effective, independent and impartial investigation into allegations of the most serious kind.

11. In our view, this recommendation requires that the GoB establish a distinct and independent investigative prosecutorial unit with the responsibility to determine accountability both of an individual character and in respect of systemic and institutional issues arising out of the events on which the BICI reported. The importance of establishing a *distinct* prosecutorial unit, as opposed to proceeding by way of a number of discrete investigations into individual conduct, follows from the requirement that the investigations in contemplation in paragraph 1716 must be capable of examining institutional and systemic issues, including as may go to issues of superior responsibility. Discrete investigations into individual conduct are not, in our view, likely to be well placed to address such issues. A distinct and independent investigative prosecutorial unit, lead at senior levels, and capable of looking across individual cases, would therefore be appropriate in these circumstances.

12. Different jurisdictions approach tasks of this nature in different ways. In many civil law jurisdictions, it would be common to appoint an investigating magistrate, supported by a team of prosecutors, criminal investigators and forensic experts. In some common law jurisdictions, this role would be allocated to a special prosecutor. In other cases, an independent unit would be established within the existing independent prosecutorial authority, with a senior figure at its head, and staffed and supported as necessary.

13. In our view, it is not significant what this distinct prosecutorial unit is called. What is important is that it meets, at a minimum, the requirements of independence, impartiality and effectiveness set out in paragraph 9 above, including as to the necessary specialist expertise and investigative capacity. We consider that such a unit could properly be established within the Attorney General’s Office, led at senior prosecutorial level, and supplemented by specialist expertise and investigative capacity that will be necessary for it to fulfil its task. For ease of reference, we refer to this unit in neutral terms simply as the BICI Investigations Unit.

14. Established in this form, the BICI Investigations Unit would report to, and come under the overall supervision of the Attorney General. From our reading of the BICI Report, there is no suggestion that the Attorney General or the Public Prosecution is tainted by the events on which the BICI reported such as to require that the investigations unit required by paragraph 1716 should be established outside the Attorney General’s Office. On the contrary, we consider that there is longer-term merit in establishing the BICI Investigations Unit under the framework

of the Attorney General precisely for purposes of facilitating the long-term development of expertise within this Office.

15. Given the high number of cases that the BICI Investigations Unit will be required to investigate, as well as the requirement to look into institutional issues more widely, it will be necessary for the specialist expertise and investigative capacity of the Unit to be supplemented. To this end, it will be necessary for the Attorney General either to secure the secondment to the BICI Investigations Unit, or to hire into the Unit directly, an appropriate number of suitably experienced and independent criminal investigators and forensic experts. The experience and independence of these personnel will fall to be assessed by reference, at a minimum, to the criteria indicated in paragraph 9 above. Once located in the BICI Investigations Unit, these criminal investigators and forensic experts should be subject to the instruction, direction and control of the Head of the BICI Investigations Unit and, as appropriate, in his supervisory capacity, the Attorney General alone. It would, further, be appropriate to affirm explicitly, in the arrangements implemented by the Attorney General to set up the BICI Investigations Unit and to establish its mandate, that all the personnel of the Unit shall be required to take instruction only from the Head of the Unit and, as appropriate, in his supervisory capacity, from the Attorney General, and not from any other person or body.

16. To further bolster the experience available to the BICI Investigations Unit, we propose, additionally, that the Supreme Judicial Council appoint a senior independent adviser with the dual roles of Adviser to the Supreme Judicial Council on these matters and of Independent Investigations Counsellor to the BICI Investigations Unit. Noting that the Attorney General is a member of the Supreme Judicial Council, the appointee to these roles would work closely with the Attorney General and the BICI Investigations Unit for purposes of providing strategic advice and experience on the work of the Investigations Unit.

17. As part of the institutional dimension of its investigations, the BICI Investigations Unit will have to consider questions of “superior responsibility”. This concept, which is well established in international criminal law, including as a principle of customary international law, provides that criminal liability may arise not only from actions that constitute planning, ordering, inducing or otherwise aiding and abetting a crime (which give rise to direct criminal responsibility), but also in circumstances in which a (civilian or military) superior knew or had reason to know that a subordinate was about to commit an offence, or had already done so, but failed to take reasonable steps to prevent the offence or to investigate and punish it.

18. **Paragraphs 1717 and 1718 (second sentence)** recommend the establishment of internal independent inspectors general, or ombudsman’s offices, in the Ministry of the Interior (MoI) and in the National Security Agency (NSA). At a minimum, both of these offices, and the processes established in respect of their work, must meet the requirements of independence, impartiality and effectiveness noted in paragraph 9 above. Given the different functions and character of these bodies, it is appropriate that the detailed arrangements in respect of these Ombudsman Offices are tailored to meet the requirements of the institutions to which they will be related.

19. As regards the **paragraph 1717** recommendation to establish an Ombudsman’s Office in the MoI, members have had extensive discussions with John Timoney and John Yates on these matters, as well as with others in the MoI, including with the Minister and his senior officials. These discussions have focused both on the legal requirements of independence, impartiality and effectiveness in respect of the Ombudsman’s Office and on wider issues of institutional reform within the MoI of a complementary nature. Mr Timoney and Mr Yates bring extensive practical experience of these matters from a policing perspective and we have therefore combined with them, and supported their efforts, in drawing up the practical proposals to give effect to the paragraph 1717 recommendation as well as to wider supplementary departmental reform in the MoI.

20. As the detail of these proposals is addressed in a paper prepared by Mr Timoney and Mr Yates, into which we have had input, we do not repeat that advice here. In broad brush, however, the essential features of the proposals in respect of the MoI and the MoI Ombudsman are as follows.

- (a) An Independent Ombudsman should be established with responsibility for overseeing and conducting independent investigations into clearly defined circumstances involving (i) the most serious allegations made against the police, and/or (ii) serious issues affecting public confidence in policing. These will include such matters as deaths in custody and allegations of serious mistreatment.
- (b) The Independent Ombudsman should sit outside the immediate hierarchy of the MoI, reporting to the Minister. It would be appropriate that the Office of the Independent Ombudsman is established by Decree.
- (c) The Attorney General will retain primacy in respect of all criminal investigations. A Protocol should be drawn up to address the respective responsibilities of and cooperation between the Attorney General and the Independent Ombudsman.
- (d) Separate from the Independent Ombudsman, there should also be established in the MoI and Internal Affairs Department which will have internal responsibility for first order disciplinary review and personnel oversight of the police, and be the single point for the receipt, assessment and referral of all complaints against the police from the public and elsewhere.
- (e) A Protocol should be drawn up, or this may be combined into a single protocol with the matters addressed in (c) above, to address the respective responsibilities of and cooperation between the Independent Ombudsman and the Internal Affairs Department, including the latter's involvement in complaints and the procedures that will be adopted to ensure that immediate evidential opportunities are captured by the Internal Affairs Department. The Protocol will make it clear that all serious matters (as described in (a) above) must immediately on receipt be referred for further investigation to the Independent Ombudsman or to the Attorney General.
- (f) The role of the current Inspector-General's Office of the MoI should be transformed in two ways. First, it should no longer have any responsibility for any matter of prisons management and oversight. Second, its responsibilities should be focused on internal MoI quality assurance and review, including in respect of short-term detention facilities, ie, while detainees are still under the jurisdiction of police. The Inspector General should not, however, have any investigative role in relation to complaints against the police, which should be addressed by the Internal Affairs Department, the Independent Ombudsman or the Attorney General as appropriate.

21. As these proposals imply, we consider that a prerequisite for the meaningful implementation of the recommendation to establish an independent and impartial inspector general's office in the MoI is that oversight of the police must more generally be placed on a firmer and fuller footing than is the case at present. The legal framework relevant to these issues should over time be developed to include detailed guidelines on police standards and behaviour, both of a legislative character and in codes of practice and professional standards guidelines.

22. As regards the **paragraph 1718, second sentence** recommendation to establish an Ombudsman's Office in the NSA, we have had extensive discussions with the NSA. As a preliminary matter, we note the following. The NSA is a security and intelligence agency rather than a policing body. Legislative changes that have been made following the BICI Report have removed from the NSA all powers of arrest and detention. This is appropriate and establishes the NSA's profile and responsibilities closer to those of intelligence and security agencies

elsewhere whose responsibilities are focused on intelligence gathering and threat mitigation. These are proper and legitimate functions that are appropriately regulated by law.

23. A prerequisite for the meaningful implementation of the recommendation to establish an Independent Ombudsman in the NSA is that the Independent Ombudsman's function must be located within a wider, visible legislative framework governing the NSA. The Independent Ombudsman's Office should be established by Decree. Amongst other elements, this Decree should address the central importance of maintaining and securing the confidentiality of the information held by the NSA and of its legitimate activities. This would be in line with the arrangements in respect of comparable agencies worldwide.

24. Following discussion with the NSA, and with Professor Bassiouni, we propose the establishment of an Independent Ombudsman's Office in respect of the NSA that has the following core features, noting that, as regards the establishment and structure of the Ombudsman's Office, the fundamental issue will be that the Independent Ombudsman should be, in his or her person, as well as in the Office of the Independent Ombudsman, an independent and impartial entity, personally and organisationally distinct from those that may be the subject of investigation.

25. The core features of the Independent Ombudsman in respect of the NSA should be the following.

- (a) The Independent Ombudsman should be a separate office in the NSA, not under the control, authority or direction of any person. The Ombudsman should report in parallel to the Head of the NSA and the Prime Minister, and, through the Prime Minister, to the King. The establishment of the Independent Ombudsman should therefore be addressed in a Decree or other legislative measure.
- (b) The Independent Ombudsman should have two separate places of work. First, the Ombudsman should have a distinct and secure office within the NSA, solely reserved for his or her exclusive use and within which the Ombudsman's papers and other information can be held separately and securely from NSA papers and information. This office should be the only location at which the Ombudsman would be mandated to conduct enquiries of NSA personnel and to examine NSA information. Second, the Ombudsman should have a separate, distinct and secure office outside the NSA, preferably in the Ministry of Justice, which would be the only location at which the Ombudsman could keep papers and other records concerning complainants and other information of a confidential nature necessary to ensure the safety and the privacy of complainants and other interested persons.
- (c) The person appointed as Independent Ombudsman should, through his or her experience and personal qualities, be someone who would be demonstrably of the highest professional and personal integrity, preferably a senior and experienced lawyer governed by legal professional standards of conduct.
- (d) The Independent Ombudsman should have a separate and secure budget, adequate to its tasks, that is ring-fenced from the budget of the NSA and from external influence.
- (e) Within this structure, the Independent Ombudsman should be empowered to make such enquiries of, and to have secure access to, such persons and information as may be necessary for him or her to pursue their investigatory tasks efficiently and effectively.
- (f) The Independent Ombudsman should be set up in such a manner as to be able to receive complaints, communications and information in absolute confidence and to handle them, and to secure the safety and privacy of complainants, in a manner that is

utterly secure. All such complaints, communications and information should be held at the Ombudsman's office located externally to the NSA.

- (g) The Decree establishing the Ombudsman's office should address explicitly the responsibility of the Independent Ombudsman to maintain the security and confidentiality of NSA conduct and information.
- (h) Provision should be made for an unclassified, but sufficiently informative report by the Independent Ombudsman in respect of any complaint and investigation to be provided to the complainant and other affected persons.
- (i) On appointment, the Independent Ombudsman should prepare a public document that addresses such matters as (i) the procedures of the office, including issues of timeliness of investigations, (ii) receipt of complaints, (iii) provision for the safety and security of complainants, etc.
- (j) The Decree establishing the Ombudsman should require the full cooperation of all State agencies and officials with the Ombudsman.
- (k) Insofar as this is not already the case in respect of the NSA, the Attorney General should be given primacy in respect of all criminal investigations, including in respect of NSA personnel and conduct. A Protocol should be drawn up to address the respective responsibilities of and cooperation between the Attorney General and the Independent Ombudsman.
- (l) In addition to an Independent Ombudsman, there should also be established within the NSA a Professional Standards Office that would have responsibility for professional standards, training, and related matters within the NSA. A Protocol should be drawn up between the Professional Standards Office and the Independent Ombudsman to address their respective areas of competence, areas of cooperation, and areas of potential overlap.
- (m) The Decree establishing the Independent Ombudsman should provide that the Ombudsman must submit a semi-annual confidential report in parallel to the Head of the NSA and to the Prime Minister, and, through the Prime Minister, to the King, reporting on the matters that the Independent Ombudsman has investigated.

26. **Paragraph 1719** recommends the adoption of legislative measures requiring the Attorney General to investigate claims of torture and other forms of cruel, inhuman or degrading treatment or punishment and the use of independent forensic experts. It also recommends that the legislation provide for appropriate remedies in such cases.

27. The implementation of this recommendation is in principle straightforward, requiring either clarification that the necessary legislative measures are already in place or the passing of legislation to give effect to these elements. Full implementation of the recommendation, however, requires at a minimum that two additional elements are also addressed. First, a full and careful review will be necessary to ensure that the crimes that come within the investigative responsibility of the Attorney General include both all conduct that is criminalised by the Convention Against Torture and that such crimes also include other conduct which, by reference to other international treaties to which Bahrain is a party, is also criminalised. Second, this review should also address whether the Bahrain Penal Code and Code of Criminal Procedure include provisions sufficient to address conduct that would be engaged by the concept of superior responsibility.

28. As regards this latter aspect, we note above that the concept of superior responsibility is well established in international criminal law, including as a principle of customary international

law. Whether or not the concept is explicitly already part of the criminal law of Bahrain, we anticipate that some or all of its constituent offences (noted in paragraph 19 above) will be part of Bahraini criminal law. Further, insofar as the Convention Against Torture has been promulgated into Bahraini law, and that the Convention has been construed by the Committee Against Torture established under the Convention as including the concept of superior responsibility, we anticipate that there should not be any significant obstacle of retroactivity in respect of such offences for purposes of the investigation and prosecution of the conduct addressed in the BICI Report.

29. Given the special circumstances and the heavy burden of responsibility that will be placed on the Attorney General's Office, we consider that it would be appropriate to reinforce the Attorney General's Office by the appointment of one or more independent human rights counsellors to assist the work of the Office on the issues addressed in the BICI Report. This is separate from of the proposal in paragraph 16 above that the Supreme Judicial Council appoint a senior independent adviser with the responsibility *inter alia* of Independent Investigations Counsellor to provide strategic advice and bring strategic experience to the work of the BICI Investigations Unit.

30. Issues of training and capacity building in respect of the Attorney General's Office are of considerable importance. These are addressed as part of the advice in respect of paragraph 1722(f).

31. **Paragraph 1722(a)** recommends that allegations of torture and similar treatment be investigated by an independent and impartial body, following the Istanbul Principles. **Paragraph 1722(b)** recommends the establishment on an independent body to examine all complaints or torture or ill-treatment, excessive use of force and other abuses at the hands of the authorities. **Paragraph 1722(d)** recommends that all detention should be subject to effective monitoring by an independent body.

32. **Paragraph 1722(a)** overlaps with paragraphs 1716 and 1719, with the result that responsibility for the investigations described therein may properly be vested in the Attorney General's Office. The requirements of independence, impartiality and effectiveness noted in paragraph 9 above would also apply in respect of this recommendation.

33. Similarly, **Paragraph 1722(b)** also overlaps significantly with paragraphs 1716, 1719 and 1722(a) such that it can properly be read coextensively with the earlier paragraphs with the result that responsibility for the investigations described therein may also properly be vested in the Attorney General's Office.

34. A different reading could, however, take **paragraphs 1722(b) and 1722(d)** together, combining the responsibilities of the independent bodies contemplated in the two recommendations. On this approach, the focus of the paragraph 1722(b) independent body would be *complaints*, rather than claims of an already established character, ie, allegations whose *prima facie* quality requiring criminal investigation had already been established. The remit of this body could then be combined with that of the independent body contemplated in paragraph 1722(d) for purposes of monitoring detention.

35. If this reading is adopted, to achieve these dual purposes, the GoB would either have to establish a new standing independent body or it would have to sufficiently revise the mandate of the National Human Rights Institution for purposes of demonstrably ensuring its independence, impartiality and effectiveness, as well as extending its mandate appropriately in respect of detention monitoring.

36. As noted in paragraph 20(f) above, we consider that the Inspector General of the MoI should no longer have management and oversight responsibility in respect of prisons. Nor, in our view, should such responsibility rest with the Attorney General's Office, even though it

would be appropriate for the Attorney General's Office to retain competence to undertake such periodic or *ad hoc* investigations in prisons as may be necessary or appropriate to fulfil his criminal investigatory responsibilities.

37. If this advice is accepted, it will be necessary for the GoB to consider further where responsibility for the management of oversight of prisons should be located. As this is an issue that has considerable governmental resource and administration implications, we do not make a proposal in respect of this matter other than to advise that it would be appropriate that prisons administration and oversight responsibility be vested in a single department, properly resourced, rather than spread across a number of departments.

38. **Paragraph 1722(f)**, addressing the training of the judiciary and prosecutorial personnel, is of the utmost importance. We understand that the GoB has already had detailed discussions with the United Nations Office on Drugs and Crime (UNODC) and the Istituto Superiore Internazionale di Scienze Criminali (ISISC) in Siracusa, Italy in respect of these matters. Both institutions would bring significant expertise and experience to the task and there is accordingly no need for us to comment further on this aspect.

39. Separately, full and meaningful implementation of the BICI institutional recommendations would also, in our view, require a deeper capability review of the key Bahraini rule of law institutions. In addition to the bodies noted in the preceding paragraph, amongst other organisations that would be well placed to undertake such a capability review, we would highlight the Council of Europe Venice Commission on Democracy Through Law. Other organisations that would also be well placed to assist in this matter are the New York-based International Centre for Transitional Justice, the Hague-based International Association of Prosecutors, and the London-based Bingham Centre for the Rule of Law.

40. Although this is not addressed in paragraph 1722(f), we also emphasise a point already made above, namely, the importance of the formulation and adoption of codes of practice and professional standards guidelines in respect of both the police and the NSA, and a programme of on-going training of the personnel of these institutions.

Conclusion

41. By way of conclusion, we note that the international treaties cited in paragraph 7 above have all been promulgated into Bahraini law and are thus directly available for consideration in court. It should therefore be a relatively straightforward matter to ensure that such elements of law are properly part of the considerations of the court in any relevant legal proceedings. In the first instance, this may be achieved through the medium of enquiry by the judge in any case to both the prosecution and the defence to be informed of any principle of international human rights law that may have a bearing on the matter in issue.

15 February 2012

Sir Daniel Bethlehem QC
Sir Jeffrey Jowell QC
Professor Adnan Amkhan Bayno
Professor Sarah Cleveland
David Perry QC