



**Turks and Caicos Islands
Commission of Inquiry 2008-2009**

into possible corruption or other serious dishonesty in relation
to past and present elected members of the Legislature
in recent years

**Interim Report of the Commissioner
The Right Honourable Sir Robin Auld**

Presented to His Excellency, Gordon Wetherell,
Governor of the Turks and Caicos Islands
28th February 2009

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APPOINTMENT OF COMMISSION OF INQUIRY

[Turks and Caicos Islands Coat of Arms]

IN EXERCISE of the powers conferred on me by section 2 of the Commissions of Inquiry Ordinance (Cap. 21), **I, RICHARD TAUWHARE MVO**, Governor of the Turks and Caicos Islands, do hereby appoint **THE RIGHT HONOURABLE SIR ROBIN AULD** to inquire into the following matter, which is, in my opinion, of public importance.

Whether there is information that corruption or other serious dishonesty in relation to past and present elected members of the TCI House of Assembly (previously known as the Legislative Council) may have taken place in recent years.

I ALSO DIRECT that the inquiry shall commence within one week of the date of this appointment and shall be conducted in Providenciales, Grand Turk or any other location(s) which the Commission may consider necessary or appropriate in furtherance of the inquiry, and at such times as it may deem appropriate.

I ALSO FURTHER DIRECT that the Commission shall submit preliminary findings and recommendations to the Governor within sixteen weeks of the date of this appointment¹ concerning:

- (a) instigating criminal investigations by the police or otherwise;
- (b) any indications of systemic weaknesses in legislation, regulation and administration;

[removed by Order of the TCI Court of Appeal, 26 September 2008]

- (c) any other matters relating thereto

¹ Since extended to 30th April 2009

In relation to paragraph (a) above, the Commission is directed to refer such information and/or evidence it may obtain to the Turks and Caicos Islands prosecuting authorities.

I DIRECT FURTHER that, without prejudice to the powers granted to the Commission under Section 4(1)(h) of the Commissions of Inquiry Ordinance, the Commission shall conduct such parts of the inquiry that it may deem appropriate, *in camera*.

AND I FURTHER DIRECT that the Commission shall take the oath or affirmation as specified in the said Ordinance before undertaking the said inquiry.

AND FURTHER I DIRECT that the Commission shall exercise all such powers as may be necessary for the purposes of this inquiry and as may lawfully be exercised by the said Commission.

GIVEN under my hand and the public seal this 10th day of July, 2008.

RICHARD TAUWHARE, MVO

GOVERNOR

[Public Seal]

Submission of Report

Your Excellency,

Your predecessor in the office of Governor of the Turks & Caicos Islands, His Excellency Richard Tauwhare MVO, appointed me as sole Commissioner under a warrant signed and issued by him on 10th July 2008, pursuant to the *Commissions of Inquiry Ordinance* (Ch 21). The warrant, which is reproduced at the head of this Interim Report, required me to conduct an inquiry into the possibility of corruption or other serious dishonesty in relation to past and present Members of the Legislature of the Turks & Caicos Islands and to report my findings and recommendations by the end of October 2008. On 14th July 2008 I attended before His Excellency in Grand Turk and took the oath. On the following day, 15th July, he and I attended and spoke at a press conference in Providenciales, at which I opened the Inquiry.

For reasons with which you became familiar following your succession to his Excellency as Governor on 5th August 2008, and which have been well publicised in Press Reports issued by Your Excellency and Commission, it became necessary, twice, for you to enlarge the time for the conduct of the Inquiry and submission of the Report. The Report is now to be submitted by 30th April 2009.

Following my appointment in July 2008, I spent the best part of six months until early January 2009, making written enquiries, mainly from the Commission's Office in London. In doing so, I had the able and dedicated assistance of Mr Alex Milne and Miss Sarah Clark, Counsel to the Commission, Mrs Jacqueline Duff, Solicitor to the Commission, and Mr Laurance O'Dea and Miss Bahareh Ala-eddini, respectively Secretary and Assistant Secretary to the Commission.

As you know, in early January 2009 the Commission moved to Providenciales in the Turks & Caicos Islands to conduct oral proceedings, in the main for the purpose of examining Ministers and other Members of the House of Assembly as to their interests declarable under the *Registration of Interests Ordinance 1993* (No 6 of 1993) and/ or sought by the Commission under the *Commissions of Inquiry Ordinance*. Despite earlier requests from the Commission, many of those interests

had still not been disclosed. The oral proceedings, which included, towards the end, evidence from a number of other witnesses called by the Commission, took just over four weeks, ending on 11th February 2009. For reasons that I gave on that day when closing the proceedings, I considered that there was a national emergency in the Territory necessitating an Interim Report by 28th February 2009 at the latest. The Commission “Team” returned quickly to the United Kingdom to enable me, with their help, to prepare it. I have completed it today, 28th February 2009, and present it herewith for Your Excellency’s consideration.

A handwritten signature in cursive script, reading "Robin E. Auld". The signature is written in dark ink on a light-colored background.

The Right Hon. Sir Robin Auld

ACKNOWLEDGEMENTS

As this is only an Interim Report, I shall, in the main, reserve to my Final Report the many and warm acknowledgements due to so many for their help in the Commission's inquiries in and from the Turks and Caicos Islands, the United Kingdom and elsewhere. I cannot, however, submit this Report without recording the welcome accorded to the Commission by the people of the Turks and Caicos Islands and valuable assistance given by the many who, voluntarily, made contributions in writing and and/in oral evidence, and by some who gave oral evidence on summons.

I include in my thanks the Governor, His Excellency Gordon Wetherell, his predecessor, His Excellency, Richard Tauwhare MVO, and their hard-pressed Staff, the Attorney General and the many senior Departmental Officials and their staffs who responded promptly and helpfully to our many requests for information and assistance.

The Commission was also extremely fortunate in the arrangements made for its accommodation and oral proceedings in January and February of this year in Providenciales. The Regent Palms Hotel, under the well-judged and hospitable arrangements made by Monica Neumann and her proficient and welcoming staff, provided us with comfortable living and a location for the oral proceedings that was just right.

In such a setting, and despite all the customary travails of any such exercise, the Commission Team, Mr Alex Milne and Miss Sarah Clark, of Counsel, Mrs Jacqueline Duff, Solicitor, and Mr Laurance O'Dea and Miss Bahareh Ala-eddini, respectively Secretary and Assistant Secretary, all gave more than their best, not just to me, but also, I believe, to all who attended the hearings or had occasion to contact the Commission.

In addition, I should record my gratitude to the Commission's Real-Time Stenographers, Christina Yianni and Catherine Eden, without whose dogged and talented work in producing daily transcripts of the hearings, much of interest and importance for many at the time and for the future, would have been lost. A similar and equally fulsome tribute is due to David Woods, the Commission's Web-Site Consultant, for his regular postings of the transcript and other information about the Inquiry's work.

Finally, a thank you to the Royal Turks and Caicos Police, who, under the direction of Superintendent David Ryder, ensured – with great efficiency and unobtrusively – the orderly and secure manner in which the Commission was able to go about its task.

PART 1: INTRODUCTION

- 1) On 10th July 2008 I was appointed sole Commissioner of Inquiry under the terms of the Turks and Caicos Islands *Commissions of Inquiry Ordinance* (Cap 21) by His Excellency Richard Tauwhare, the then Governor of the Islands. The Terms of Reference of the Commission (taking into account subsequent amendment) were as follows:

To inquire into whether there is information that corruption or other serious dishonesty in relation to past and present elected members of the House of Assembly may have taken place in recent years... [and] to submit ... its preliminary findings and recommendations concerning:

(a) instigating criminal investigations by the police or otherwise, [and to refer such information and/or evidence it may obtain to the TCI prosecuting authorities]

(b) any indications of systemic weaknesses in legislation, regulation and administration

(c) any other matters relating thereto.

- 2) The tasks set for me by the Terms of Reference could not sensibly have been expressed with lower thresholds.
- 3) Under Term of Reference (a), I am to consider whether there is information - in whatever form and giving it the weight I consider it deserves - of *possible* corruption "in relation to", that is, involving, elected Members, past and present, of the Legislature. If so, I am to consider whether to recommend criminal investigation by the police or other bodies. The potential targets of the Commission's Inquiry and any such criminal investigation are those who may have been bribed, those who may have bribed them and/or those who may

have been parties to any such corrupt and/or otherwise seriously dishonest behaviour.

- 4) Under Term of Reference (b), whether or not I recommend criminal investigations, I am to consider, in the light of the information before me, making findings as to any systemic weakness in legislation, regulation or administration, and, if I so find, to make recommendations for change in order to prevent and to deter corruption and/or other serious dishonesty.
- 5) Under Term of Reference (c), I am to consider, in the light of the information before me, whether to make findings and/or report on any other related matters, for example, those that bear in a fundamental way on any statutory, regulatory and/or administrative changes I am minded to recommend. These I have interpreted as including the extent of and manner of grant of the Franchise, the Constitution, the overall structure of the Territory's system of governance and control, and any relevant Codes of Public or Professional Conduct.
- 6) Over the six months of extensive written inquiries by the Commission before it began its oral proceedings in Providenciales in January and February 2009, I had found much information pointing to possible systemic corruption or of other serious dishonesty involving past and present elected Members of the Legislature in recent years. I had also found indications of systemic weaknesses in legislation, regulation and administration and in related matters calling for attention by way of recommendation.
- 7) The oral proceedings - required in the main to secure full disclosure of interests from Ministers and other Members of the House of Assembly - have provided further information in abundance pointing, not just to a possibility, but to a high probability of such systemic venality. Coupled also with clear signs of political amorality and immaturity and of general administrative incompetence, they have, in my view, demonstrated a need for urgent suspension in whole or in part of the Constitution and for other legislative and administrative reforms. There are also strong indications, in the information before me, of the need for change in other related matters.

- 8) I, therefore, submit this Interim Report to you at this early stage – well before the expiry of the Commission’s extended period for completing the Inquiry and reporting. In it, I identify in more detail the broad concerns that I expressed in my public statement at the close of the Commission’s oral proceedings in Providenciales on 11th February 2009. As I then indicated, government of the Territory is at a near stand-still. The Cabinet is divided and unstable. The House of Assembly stands prorogued until 1st April 2009. The Territory’s finances are in dire straits and poorly controlled. There is a settled pattern of recourse to disposals of Crown land to fund recurrent public expenditure, for want of governmental revenue from other more fiscally conventional sources. I should have added that the financial position is so bad that the Government cannot pay many of its bills as they fall due. Governmental and other audit recommendations lie ignored and unattended. In short, there are wide-spread fears on the part of the people of the Territory that they are leaderless and that their heritage is at risk of continuing to drain away.
- 9) This Report – for the above reasons compiled in haste – consists of a list of recommendations under Parts (b) and (c) of the Commission’s Terms of Reference, namely as to constitutional and other systemic reforms and related matters. They will require considerable development and elaboration in my Final Report, so as to provide more comprehensively for the middle and the long term. Some are of great urgency to meet what I consider chronic ills collectively amounting to a national emergency. The others are for the middle and longer terms, but require early consideration with a view to making ready for their timely introduction in due course.
- 10) As I have said, I am also satisfied on the information before me under Part (a) of the Commission’s Terms of Reference of a high probability of systemic corruption and/or other serious dishonesty involving past and present elected Members of the House of Assembly and others in recent years. However, I am not ready to formulate provisional findings or recommendations for institution of criminal investigation in relation to any individual or any such interests he or she may have. When I am ready to do so, I shall, as I have publicly indicated, give each individual concerned an opportunity to make representations. I shall then take any such representations into account before making findings and

recommendations under Term of Reference (a) in my further Report. Accordingly, I make no findings or recommendation in this Interim Report under that Term of Reference, save peripherally in recommendations (2), (16) and (17) below for preparation for the appointment of a Special Prosecutor to direct and conduct such investigations as I may recommend in my further Report, for additional Judges and trial by Judge alone.

- 11) **My Interim Recommendations**, contained in Part 2 of this Interim Report, in approximate order of urgency but with much overlap in timing, may be grouped under the following headings:

	Para.
The Governor's Office and Attorney General's Chambers	(1)
Additional Judges and Courts	(2)
Recovery of public assets	(3)-(4)
Suspension of the Constitution	(5)
Direct Rule through the Governor and Council	(6)-(7)
Governance and Fiscal Review	(8)-(10)
Crown Land Allocation, Sale and Management	(11)
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Part 2: RECOMMENDATIONS

(1) The Governor's Office and Attorney General's Chambers:

- i) As a matter of urgency, and subject to recommendations (2), (3) and (4) below, provide more and better resources for the Governor's Office and the Attorney General's Chambers to enable them to cope with their present workload and in the medium-to-longer term, having regard to the surge of work likely to be engendered by such acceptance as there is of this Interim Report and my Final Report.
- ii) Provide adequate and secure accommodation for the Attorney General's Chambers, including all security cover required, to ensure adequate protection of work in hand and that likely to be required for the protection of personnel, work and records of any Special Units instructed pursuant to recommendations (3) and (4).

(2) Additional Judges and Courts:

Prepare to appoint additional Judges and court officers of high calibre, on temporary secondment, and secure additional court premises to accommodate the corresponding surge of judicial work likely to be engendered by such acceptance as there is of this Report, (see in particular paragraphs (3), (4), (16) and (17)).

(3) Recovery of Public Assets – Special Civil Recovery Unit:

Establish and provide adequate secure accommodation for a Special Civil Recovery Team (to act as agent of the Attorney General in general civil proceedings and/or as agent to him as the "Civil Recovery Authority" under section 2 of the *Proceeds of Crime Ordinance 2007*) and other necessary resources, to make an early start on instituting civil proceedings for early freezing or recovery of land and/or assets pending recovery, and other interim or final interim injunctive relief in support of civil proceedings in the Territory and/or world-wide (see e.g. *the 2007 Ordinance*, Part III, ss 59 – 90, in particular ss 72 -

80 for Interim Receiving Orders, and/or by the police for Production Orders under Part V, ss 127 -130.

(4) Recovery of Public Assets – Special Criminal Recovery Unit:

If necessary, in addition to, or in combination with, the Civil Recovery Team, provide a Special Criminal Recovery or Confiscation Team and other resources to prepare for and, if necessary, take parallel proceedings for restraint and confiscation orders in the Territory and/or world-wide under Part II, ss42(a) and/or (b) – 53 and 58 of the *2007 Ordinance*.

(5) Suspension of Constitution:

Make arrangements for the suspension of the entire Constitution for an indeterminate period, to replace the democratic process presently provided by the Cabinet and the House of Assembly with direct rule from Westminster, acting through the Governor with, but not bound by, the advice of an Advisory Executive Council. This could, no doubt, be achieved by the mechanism of partial suspension of the *2006 Constitution* (see Appendix 1 to this Interim Report setting out how I believe it could be done). But such a course would produce an untidy patchwork of two live instruments, without securing any advantage of principle over temporary and complete recourse to a new Order in Council required to effect the change. Also, in my view, it would not sit well with indeterminate suspension of the Legislature, as well as the Cabinet, that, in my view, the long-standing ills and present national emergency require.²

² *cf* the *via media* favoured, albeit softly, by Sir Louis Blom-Cooper QC in his Report of the Turks & Caicos Islands Commission of Inquiry 1986 *into Allegations of Arson of a Public Building, Corruption and Related Matters*, December 1986, Cm 21, when recommending, at Cap XX, pp 99 – 100, in response to lesser allegations of corruption, amendment of Part II of the 1976 Constitution to allow the Governor to administer the Territory with the non-binding advice of an Advisory Executive Council consisting of up to four members nominated by him from the Legislature, which would remain intact, and/or eminent Belongers.

(6) Direct Rule through the Governor and Council:

The Advisory Executive Council could take one of two forms. It could be composed:

- 1) entirely of independent persons from within and/or outside the TCI of expertise in areas of governance, in particular, as to the structure, financial management, control and administration of British Overseas Territories of comparable size and economic and social development, coupled with a small consultative group or committee of eminent and, so far as possible, politically unaligned TCI residents appointed by the Governor - the option that I would commend; or
- 2) a single Council composed of an equal representation of such independent specialists and eminent residents.

(7) Replacement of Public Officers etc:

Among the powers vested in the Governor by any interim constitutional instrument should be a power to appoint and replace, after taking the advice of the Advisory Executive Council, Permanent Secretaries, Directors and other senior officers of Government Departments, and Chairmen, Directors and other senior officers of Public Boards, Commissions and other Regulatory Bodies.

(8) Governance and Fiscal Review:

- i) The FCO and DFID should give greater financial support to, and involve themselves more closely in, the governance of the Territory than hitherto – both pending and post- restoration of democratic government.
- ii) The Governor should seek the secondment of one or more persons expert in the fiscal management of British Overseas Territories to undertake an urgent review of public funding, particularly the financing of recurrent public expenditure from disposals of Crown land, and to assess revenue foregone from waivers and/or concessions in respect of stamp, import, and other duties, fees and taxes.

iii) More generally, the Governor should, on the instructions of or with the consent of the Secretary of State, seek advice by way of an urgent review or otherwise from an “International Flying Squad” of experts from the United Kingdom and/or appropriate International agencies with a view to securing, on a temporary basis and/or as appropriate and necessary in the longer term, an efficient and rigorously accountable system of governance and control at all levels, including departmental and island administrations and public boards, commissions etc. In this connection, the words of Sir Louis Blom-Cooper QC, in his recommendation 45, at page 106 of his 1986 Report, at page 106,³ are as apt today, with a few notable exceptions, as they were then:

The urgent need for financial control within government Departments demands a vast improvement in the quality of senior and middle management. The vital need is to establish an active training programme.

(9) Keep it simple:

Those conducting reviews of the sort that I propose in Recommendation (8), and any subsequent review for, say, a Constitutional Commission, should keep in mind the smallness of the Territory’s population. While allowing for the size of an economy disproportionately large for the population, the Territory should not be burdened with unnecessary governmental or administrative trappings more appropriate to a much larger nation.

(10) Annual Review of need for continuance of rule through Governor and Council:

The Governor should annually consider and take the advice of his Advisory Executive Council as to the earliest practicable date on which to seek, through the appropriate constitutional process, the end of direct rule and its replacement

³ *op cit*

by a new Constitution re-establishing democracy for the Territory by an elected House of Assembly and government by the Governor in Cabinet.

(11) Crown Land Allocation, Sale and Management:

i) Give immediate effect to the Manual of Crown Land Administration and Procedure, formerly in Part III of the Crown Land Bill, for which drafting instructions were contained in Chapters III and V of the Final Report of the Consultants, Terra Institute, of February 2008, for Implementation of the Turks & Caicos Crown Land Policy;

ii) Having regard to the March 2008 Special Audit Report of the Acting Chief Auditor, the Hon. McAllister Hanchell's evidence to the Inquiry and other information recently received, seek an instruction from the Secretary of State under section 25(1)(a) and/or (3) of the Constitution not to approve any Crown land transaction governed by the Manual unless he is satisfied that there has been full compliance with its processes and terms.

iii) Arrange for secondment to the Governor and/or to the Interim Successor Department of the Ministry of Natural Resources of an independent expert or experts on the management and allocation of Crown land so as to ensure rapid implementation of the Crown Land Manual and for vetting compliance with it of proposed land grants.

iv) At an early stage, enact and implement the Crown Land Bill, including the Manual.

(12) Integrity in Public Life:

There should be speedy implementation of the *Integrity Commission Ordinance*, enacted on 15th May 2008, with a view to the Commission:

- 1) conducting an early and widely-spread examination under section 13(1)(f) of the *Ordinance* of the practices and procedures of those in public life and public bodies in order to facilitate the discovery of corrupt practices, if and to the extent that no other person or body has a statutory duty to perform that function;
- 2) instructing, advising and assisting the management of public bodies, pursuant to section 13(1)(g) of the *Ordinance*, as to change in practices or procedures that may be necessary to reduce the occurrence of corrupt acts, if and to the extent that no other person or body has a statutory duty to perform that function;
- 3) the Commission itself and/or any other appropriate public body providing early publicity to, and education in respect of, the *Ordinance*'s definition and manifold categories of corruption set out in section 44;
- 4) reviewing the sufficiency of particularity required from "person[s] in public life" in annual Declarations of their Financial Affairs required of them by section 25 of and Schedule 2 to the *Ordinance*; and
- 5) reviewing the procedures for enforcement by the Attorney General or other appropriate public bodies, pursuant to section 35 of the *Ordinance*, of the section 25 duty to declare their financial affairs, so as to ensure speedy and otherwise effective proceedings and timely imposition of significant penalties for non-compliance where required.

(13) Maintenance, Publication and External Audit of Political Parties' Accounts:

All purported political parties should be required to register as such with an authority such as the Integrity Commission, and to maintain accounts disclosing the names of those making donations to them above a level - to be prescribed – and/or on whose behalf they have made donations. The accounts should be subjected to an external audit, with sanctions for non-compliance. There is no logical basis for secrecy about political donations and their sources if the motive for giving and receiving them is in the public interest.

(14) Effective use of the Government's Web-Site in the Interests of the Public:

In the light of the declared ignorance of some Ministers and other Members of the House of Assembly of what is required of them as public servants, and possibly others in public office, the Government's web-site should be expanded and kept up to date with, among other information:

- 1) the *Code of Conduct for Ministers of the Turks & Caicos Islands* and any other similar codes promulgated for those in public office;
- 2) the *Integrity Commission Ordinance*;
- 3) annual declarations of financial affairs made by Members of the Legislature pursuant to that *Ordinance*, within a short period – to be prescribed – of their final dates for submission or a notation that no declaration has been submitted;
- 4) details of any sanction imposed for such non-compliance;
- 5) all audit reports prepared by the TCI Audit Office and required to be laid before the Legislature - within a period to be prescribed after the due date for such action – or a statement of explanation for non-compliance;
- 6) all minutes and reports of the Public Accounts, Expenditure and Administration Committees of the House of Assembly (or cognate bodies in the interim) within a short period - to be prescribed – after their due dates for reporting;
- 7) a complete and up-to-date set of TCI Ordinances, giving prominence to a new Constitution if and when there is one, the *Integrity Commission Ordinance* and the *Crown Land Ordinance* when enacted and in force;
- 8) an up-to-date copy of the electoral roll, by constituency, but omitting addresses and any points of contact; and
- 9) posting, as they occur, all entries in the *Gazette*, including allocation of Crown Land, grants of Belonger status, Permanent Residence etc.

(15) Disqualification from Public Office:

Disqualification from membership of the Legislature for longer periods than presently prescribed of those of its Members who have been convicted of serious criminal offences. The present provisions only disqualify a person for five years following a period of imprisonment of at least 12 months, no matter how long that imprisonment was, nor how serious the offence. Consideration should be given to disqualification for life in certain serious cases, and for a declaration to be made that a person is “Unfit to Hold Public Office”.

(16) Criminal Trial by Judge alone:

Criminal Trial by Judge alone – The Governor should, if so advised, consider seeking the inclusion by the Privy Council in any Order in Council suspending the present Constitution, of a provision for the introduction of a special court or courts and/or special procedure of trial by judge alone for cases where trial with a jury would risk impairment of the administration of justice.

See, for example, the provisions in England & Wales under sections 43 and 44 of *Criminal Justice Act 2003* for trial by judge alone in cases respectively of serious and complex fraud and where there is a danger of jury tampering; also, in Northern Ireland under the *Justice and Security (Northern Ireland) Act 2007*, sections 1 – 9. See also the wide-spread use of “bench” trials (i.e. trial without jury at the option of the defendant) in common law jurisdictions, for example, in many of the States of the United States, the Commonwealth, including Canada, Australia and New Zealand, the Falkland Islands and St Helena.

Such a course would involve the removal of the present right to trial by jury contained in section 6(g) of the present TCI Constitution. But trial by jury is not a pre-condition of the “fair trial” requirement of Article 6 of the ECHR, of which this provision is an elaboration. Trial without jury is also a feature of a number of jurisdictions throughout the World, including India and Holland. If, as is clearly the case, it is Article 6 compliant in the many jurisdictions that permit trial of even the most serious offence without jury, it is not such a big step to take where

national and “cultural” conditions are such, as here, that no fair or effective trial of such matters considered in this Inquiry could take place with a jury. There are at least seven reasons here why such a step should be taken:

1) the stance taken by all attorneys acting for Ministers and/or other Members of the House of Assembly and others in the Inquiry was that their respective clients could not possibly be given a fair hearing by a jury, given the wide adverse publicity to allegations against them before, during and as a result of the work of the Commission; all or most of the attorneys, expressed with some cogency, in my view, the high likelihood that any trial judge, faced with an application for a stay of the prosecution on account of such prejudice, would stay it;⁴

2) the contrary consideration, if any prosecution were to survive such a stay application, is that in this highly political context it would, in the event be well nigh impossible to secure convictions of politicians by jury trial in the TCI, where the panel is of only seven jurors entitled to bring in majority verdicts by as few as five (see *TCI Jury Ordinance*, ss. 23 and 36) and where, for so many potential jurors in this jurisdiction, much turns on commitment to party politics and local and family allegiances;⁵

3) the clear risk, in such circumstances, of jury–tampering;

4) the potential complexity of allegations of corruption or other serious dishonesty of the sort canvassed in the Inquiry – taxing for any jury panel, whether in the TCI or any jurisdiction - a strong contributor to the reasoning of Lord Roskill’s Committee on Fraud Trials recommending trial of serious and complex fraud without juries;⁶

5) the length and cost of any likely prosecutions if tried with a jury; – in some cases of some months – the public and private cost of jury trial, and the concomitant intrusion, burden on the lives and distress, to all trial participants;

⁴ 2006 Constitution, s 1

⁵ cf Sir Louis Blom-Cooper QC’s 1986 Report, pages 58 and 103, para 20; and the *Report of the Constitutional Commission 1986 (the “Marshall Commission”)*, paras. 3.28 – 3.31

⁶ *The Roskill Report*, Fraud Trials Committee Report, London, HMSO 1986

6) the fragility of long and complex jury trials – see e.g. the collapse of the *Jubilee Line* trial at the Central Criminal Court after many months at a reported cost to the public purse of some £60 million;⁷ and

7) the strong public interest in what has become a state of national emergency for those responsible to be brought swiftly to justice and, if found guilty, made to expiate their crimes – an outcome, which, in my view, will be impossible if it is attempted in the Territory by way of trial by jury.

(17) Appointment of a Special Prosecutor:

If, and only if, provision is made for trial by judge alone, the Governor should appoint a Special Prosecutor for any prosecutions resulting from police investigations engendered by the Commission's Final Report. He or she should be supported by a specialist team of corruption/fraud prosecutors and experienced fraud and forensic accounting investigators, drawn wholly or in the main from outside the TCI. Their task should be to investigate and prosecute those who, after investigation, the Special Prosecutor considers should be prosecuted for involvement in corruption in relation to past and/or present elected Members of the House of Assembly and/or other serious dishonesty.

(18) A New Constitution:

i) A Constitutional Commission should be appointed to consider and draft a new Constitution, as soon as the Secretary of State or the Governor, acting on the instructions of the Secretary of State, considers it practicable to do so. I invite consideration in any such drafting exercise of the following non-exhaustive list of my recommendations, which I shall develop, and to which I shall add, in my Final Report. Broadly they are designed to correct what I regard as weaknesses in the present Constitution, other legislation and administrative practices, and to ensure good governance and proper financial management and control of the Territory.

⁷ *R v Rayment & Ors* (2005) – there are many other similar examples in England & Wales of lengthy trials aborted for reasons arising out of the vulnerability of juries to prejudice or other factors requiring their discharge before verdict.

ii) Checks and Balances - As a start, I recommend – I cannot honestly say “with diffidence”,⁸ after what I have read and heard in this Inquiry – introduction or reintroduction into the Territory’s whole system of governance of an effective system of checks and balances, for such a system is presently largely absent or side-tracked. This includes an urgent need for removal, or reduction by reference to clearly expressed criteria, of Ministerial involvement in the exercise of discretionary powers in many and various aspects of government. These include inappropriate interference in and by-passing of statutory, administrative or policy procedures in a number of areas - for example:

- 1) management and allocation of Crown land;
- 2) development approval, planning permission and control; the grant of exemptions, waivers and discounts of any type, in particular on the grant of land to Belongers, as to stamp duty on the transfer of land, and as to import duties;
- 3) grant of Permanent Residence Certificates;
- 4) grant of Belongerships;
- 5) grant, duration or termination of work permits;
- 6) grant or revocation of licences;
- 7) award of public works contracts and their “fragmentation” to evade open tendering requirements; and
- 8) grant or removal of franchises and monopoly concessions etc effectively amounting to government protected monopolies..

⁸ cf Sir Louis Blom-Cooper QC, in Chapter XX of his *1986 Report*

(19) More effective auditing:

i) introduction or facilitation of rigorous internal and external audit systems for all governmental departments and public and statutory bodies, where audit reports are promptly made publicly available and treated with respect by Ministers and used by them, board chairmen and directors, and other senior public officials to inform budgetary decisions and give effect to necessary financial control.

ii) Introduction of a more rigorous and publicly accountable system than at present obtains for the conduct and reporting of such important constitutional safeguards as the Public Accounts, Expenditure and Administration Committees.

(20) Strengthen the Crown Land Valuation Office - and introduce clearly defined criteria for valuation, and publish all valuations in the *Gazette*.

(21) Enlargement of the Franchise:

Reform, with clearly defined criteria, to widen the Franchise to long-term residents of the Territory and thereby reduce the scope for political patronage, bribery and electoral abuse, including:

- 1) removal of Ministers, the Cabinet and the Governor altogether from the process of its grant; and
- 2) placing it in the hands of a statutory body consisting of an independent chairman and members appointed by the Public Services Commission, subject to appeal only to the Supreme Court by way of judicial review or to a tribunal chaired by a serving or retired Supreme Court Judge appointed with the express approval of the Chief Justice.

(22) District Commissioners/Island Administrators:

The appointment of District Commissioners or Island Administrators, by the Public Service Commission in accordance with a public and regulated procedure, giving them clearly defined duties and powers.

(23) Morality in Public, Professional Life and Business Life:

i) The *Ministerial Code of Conduct* should be reviewed and given public effect coupled with its possible extension, subject to appropriate modification, to all holding public office, in particular officers responsible for Public Finance. It should be strengthened by regular reinforcement and reminder by training and in public educational media programmes .

ii) The *Legal Profession Ordinance* should be reviewed, in particular section 21 as to the maintenance and audit (including spot checks) of separate clients' accounts, and review by the Bar Association Bar Association of its Code of Conduct.

iii) The *Company Management (Licensing) Ordinance 1999* – This Ordinance should be reviewed with a view to giving it timely and more effective “teeth”, including heavier sanctions and removal of its enforcement from a departmental Permanent Secretary, to another more independent and judicially accountable body.

(24) Beneficial ownership of corporate bodies:

All corporate bodies and those acting for others in a trustee or nominee capacity should be required to disclose the true beneficial ownership of or interest involved to any public body required or seeking to exercise due diligence in contemplation of the grant of Crown land or of development approval or any public works or other public contract whether of franchise, licence or otherwise - coupled with a heavy potential civil (including rescission) and/or criminal sanction for non-compliance.

The Right Hon. Sir Robin Auld

28 February 2009

Appendix 1

Possible Scheme for Partial Suspension of the Constitution

Part I - Fundamental Rights and Freedoms of the Individual

Retain all subject to check for any qualifications

Part II -The Governor

Retain, save for:

Section 22 – Deputy Governor, or as to its restriction to someone who is a Belonger;

Section 23 – Acting Governor, or as to section 23(2) provisions as to who should hold such office;

Section 24 – Governor’s deputy;

Section 25 – Exercise of Governor’s functions – replace with interim provision for an Advisory or Executive Council

Part III – The Executive

Retain:

Section 26 – Executive authority vested in the Crown

Amend:

Sections 27 – 32 and 34 – 37 – The Cabinet – suspend and replace with such broadly corresponding provisions for an Advisory or Executive Council as may be appropriate;

Section 33 – Governor’s special responsibilities – suspend and replace with such broadly corresponding provisions as may be appropriate for the Governor acting with an Advisory or Executive Council and officers, and no House of Assembly.

Section 38 – Advisory National Security Council – suspend and replace with a similar body consistent with reflecting replacement of Cabinet with Advisory or Executive Council

Section 39 – Powers of Attorney General – 1) retain, save for the references in sub-section (5) to sections 52(2) and 53(2); and 2) add provisions for

special prosecutor for any prosecutions prompted by the Commission of Inquiry's Report and as to whether he or she should be subject to oversight or independent, of the Attorney General.

Part IV, Sections 40 – 58 – The Legislature

Suspend all and replace as necessary and appropriate with provisions for an Advisory or Executive Council

Part V, Sections 59 – 72 - Powers and Procedure of House of Assembly

Suspend all and replace as necessary and appropriate with provisions for an Advisory or Executive Council

Part VI, Sections 73 – 82 – The Judicature

Retain, save for the reference in section 81(1)(b) to the Premier and the Leader of the Opposition

Part VII, Sections 83 – 91 – The Public Service

Retain, save for: 1) references to the Premier, Cabinet or Cabinet Secretary, Leader of the Opposition etc. and replacement with Advisory or Executive Council; and 2) consideration of lengthening the period of disqualification from appointment to the Public Service Commission in section 83(4) since membership of the House of Assembly or of any political party from 3 to, say, 10 years.

Part VIII, Sections 92 – 93

Retain, subject to same qualifications recommended for Part VII

Part X, Sections 94 – 99

Amend:

Section 94 – Grants of land, etc – retain, but subject to compliance with procedures for allocation to be introduced in Crown Land Ordinance.

Section 95 – Powers of pardon, etc. – retain save for reference in sub-section (2) to Cabinet and replacement with Advisory or Executive Council.

Sections 96 and 97 – Public offices and appointments and Discipline of public service – retain

Section 98 – Registration of Interests – repeal once section 25 of and Schedule 2 to the *Integrity Commission Ordinance 2008* comes into effect.

Section 99 – Interpretation – this provision will necessarily require extensive revision and additions.