

**TECHNICAL SUPPORT FOR  
LEGISLATIVE REVIEW  
IN THE  
TURKS AND CAICOS ISLANDS**

**WHITE PAPER**

Prepared by

Rose-Marie B. Antoine  
Team Leader



In association with:



**BENCZEK**  
RECHTSANWALT

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## Background to the EU Technical Support for Legislative Project

The European Union Development Fund (EDF) Turks and Caicos Islands Legislative Review project is an exercise in law review and reform within the context of a public sector enhancement program. The direction and management of the project take into account the unique and sensitive context arising from a suspension of the constitution of the jurisdiction by the UK government because of findings of corruption and malfeasance in government and the ensuing climate of political and public sector reform.

The focus of the project is on the elevation of public sector management through the institution of a series of political, economic and social development projects aimed at helping to restore the economic viability and good governance of the TCI. The current project for law review and law reform is thus one component of a wider initiative of stabilization and development towards a path of greater financial viability and sustainability being undertaken by the UK administration in this transition period.

Consequently, the project aims to update the laws which are key to the governmental process in the Turks and Caicos, including laws that govern the public sector, reconciling them with the newly restructured public service sector agencies and more efficient and transparent modes of operation and other. Such laws need to be reviewed to identify deficiencies and gaps and thereafter an efficient and adequate law reform process must take place in order to improve the management of the public sector and secure the sustainability of the stabilisation and reformation program. The review and reform exercise is to be effected in a manner that allows for the compatibility of new and amended legislation with the projected new Constitution and with regional and international treaty obligations.

The focus of the Technical Team is the enhancement of the legislative regime of the Turks and Caicos through a process of informed legislative drafting and advice on particular subject areas of law. While the relevant mandate does not include direct policy advice, the EU Team is expected to guide law reform as appropriate, by providing pertinent advice on the legislative implications of particular policy and administrative direction. This includes advice and legislative proposals in substantive areas of law. The law reform exercise will be a consultative one. With this in mind, the Team has been carefully chosen to provide expertise from specialists in the various legal disciplines that straddle the law reform exercise, noted in Appendix 3. The Team is

expected to work closely with all stakeholders to enable the efficient completion of the project.

Accordingly, the project will provide the technical support necessary to appraise and update the relevant existing legislation, and where appropriate, draft new legislation. As identified in the Terms of Reference, the overall objective is to have in place the priority legislation that the public service requires to support effectively its service delivery agreements, as well as the sustainable development of the TCI.

### Aims and Objectives

While law reform is a complex and technical subject, the Government of the TCI is committed to a process that is transparent and democratic, given that the changes made to legislation will affect all persons residing in the jurisdiction. It is acknowledged that mechanisms for fulfilling these requirements include consultation and public dialogue.

The purpose of this White Paper is to provide a brief introduction to the several areas targeted for legislative review and reform as indicated in the List of Areas for Review which was provided by the Office of the Attorney General. In particular, the White Paper aims to give information on the identified policy issues at hand, the initial analyses of these policy issues by the EU Legislative Project Technical Team and possible legislative direction, including any potential obstacles to be resolved. These subject areas will involve the perusal of over 100 pieces of legislation (see Appendices 1 and 2), though not all of these statutes will be amended. The target output for the Project is approximately over 40 legislative instruments, although the final number of Ordinances and accompanying Regulations delivered will depend on the ability of stakeholders to agree on policy directives and provide necessary instructions to the Team within the resource allocations agreed.

The White Paper is also viewed as a useful vehicle for inviting public participation in these important aspects of national development. The intention is that the White Paper will serve both as a means of information and as a guide for the discussions of all stakeholders, including members of the public. This in turn will lead to a more informed dialogue of the various issues to be determined, in particular, to shape more coherent and concise legislative policy and law. The White Paper will therefore provide a vehicle for the law reform process to be consultative, thereby leading to a more meaningful and democratic law reform process, before the final resolution of the various issues at the Consultative Forum and Advisory Council levels.

### **Prior Consultations and Policy Formation**

It is important to note that consultation on the issues addressed in this paper has already begun on several levels. In some instances, drafted provisions have mirrored drafting instructions arrived at after considerable public airing of the issues and the arrival of consensus. It should be noted too that prior to the preparation of this White Paper, several detailed discussions were held with the relevant government Ministry officials and in some cases, special interest groups, in order to glean current governmental policy, or desirable policy being formulated on the various issues. As will be seen, in some areas determined to be priority, policy issues have not been settled. In relation to other sectors, in some instances, the issues targeted for law reform, were already substantially aired in the public domain and had been discussed in the Consultative Forum.

In other instances, the EU Legislative Project Technical Team benefitted from draft Bills which had already been in existence and which were handed to the Team for further review and finalisation.

In addition to comprehensive dialogue with relevant Ministry officials, the EU Legislative Project Technical Team also worked with a special Working Group made up of senior Ministry professionals and advisors, in order to undertake the necessary reviews of preparatory legislation and policy (see Appendix 4). The Working Group provided detailed policy guidance and oversight to the law reform process, including commentaries to preliminary drafts prepared by the EU Legislative Project Team.

Accordingly, the EU Legislative Project Technical Team was able to prepare preliminary legislative drafts in a number of key areas to present to the public.

### **Subject Areas Identified for Law Reform**

Several sectors have been targeted by the Government of the Turks and Caicos Islands in the EU Legislative Review in the Turks and Caicos (TCI). While there has been some fluidity in determining which are deserving of the most immediate attention, there is consensus that the following areas are to be reviewed and reformed:

1. Regulation of Healthcare Facilities and Health Professionals
2. Trafficking in Persons



3. Regulation of Crown Lands
4. Integrity in Public Life
5. Creation of a Fractional Ownership Scheme
6. Improvements to the Land Registry
7. Juvenile Justice and the Rights of the Child
8. Public Service
9. Environment, including Public Health, Agriculture and Aquaculture
10. Immigration
11. Labour and Industrial Relations
12. Upgrade of the International Financial Sector
13. Companies, Commercial Entities and Investment
14. Oversight to Implementation of Value Added Tax (VAT)
15. Education
16. Stamp Duty
17. Family Law
18. Posts and Communications (STE)

The reform imperatives of each of these subject areas are considered below. It should be noted too that of the several areas listed for reform, a number of sectors are identified as being 'urgent' or 'top priority', including subjects which are mentioned as 'milestones' in the initiative to return the Turks and Caicos to good governance.

### **Regulation of Healthcare Facilities and Professionals**

New legislation emanating from the law reform process will entail radical reform of the health sector both in relation to health professionals and healthcare facilities. Several statutes from other countries which regulate the health sector were examined and analysed in formulating a Draft Bill for regulating healthcare facilities and professionals. The EU Legislative Project Technical Team also took into account important policy directives from the World Health Organization and related international bodies. Professionals in the health sector also identified a number of

important legislative initiatives. As a result, several drafting changes are proposed to the existing law.

A new Health Regulation and Health Professions Ordinance is targeted to expand the existing scope of regulation in two main ways. First, international standards will be introduced for all healthcare facilities in the Turks and Caicos. These standards will meet best practice guidelines, both in terms of the provision of health care and the managerial functions associated with healthcare facilities. Secondly, legislation will provide for detailed regulation of all healthcare professionals in the jurisdiction.

Accordingly, the role of the current regulatory body for health will be considerably redefined. A new Agency to be known as the Health Regulation Agency, will be instituted to guide policy and provide oversight to the medical sector, including advice to the Government. The Agency will also be responsible for the issuance and revocation of licences to healthcare facilities and for overseeing such entities.

The regulation of health care facilities includes avenues for self-regulation by the private sector. Thus, the proposed new Ordinance contemplates the creation of several and separate Boards to regulate the various arms of the medical profession. These include a:

- Medical and Dental Board;
- Nursing & Midwifery Board;
- Pharmacy Board; and
- An Allied Health Professions Board.

These Boards will have substantially the same functions, essentially to regulate and discipline members of the particular profession under their purview, including the issuance and revocation of licences. Comprehensive provisions on negligence, incapacity and misconduct on the part of medical professionals will be spelt out with a view to protecting the public. Importantly, the new Ordinance will spell out clear provisions and procedures for the revocation of registration of a medical practitioner for incapacity, incompetence or misconduct, barring such persons from practise.

The new Ordinance will lay the foundation for improved management and financial oversight of healthcare facilities. The question of liability insurance for health practitioners and health care facilities is also expected to be addressed.

Existing inconsistencies in the current law regulating health care facilities and professionals will be remedied.

Other pertinent findings relate to general administrative law principles, tort and contract, since the regulation of health care professionals will fall under these broad areas of legal analysis.

### *Codes of Conduct*

The new Ordinance proposes to introduce the concept of Codes of Conduct for the respective professions in the health sector in accordance with international standards. Each individual, specialised Code will provide the basis for penalties and sanctions where registered and licensed healthcare professionals breach its provisions. Such Codes will also contemplate equitable and more uniform fee schedules for licensed healthcare practitioners.

In addition, the new law will make provision for the continuing education of healthcare professionals under the auspices of their respective medical Boards.

### *Expanded Jurisdiction of Health Regulatory Regime*

It is envisaged that the regulatory regime will be expanded to include health care professionals not previously included, such as persons who in their occupations come into contact bodily fluids (tattooists, beauticians etc.).

### *Registration and Licensing*

An important component of the new regulatory framework will be the more detailed registration and licensing regime that will be instituted. A dual system is envisaged whereby both registration and licensing functions are mandatory. This means that all healthcare professionals are required to be registered once they meet the requisite qualifications and are further required to maintain their registered status by way of an annual license fee.

Since registration functions will be separate from licensing functions in the new regime, it means that although qualified professionals will be registered permanently, they will not be able to practice unless they are licensed annually, upon the requisite licence fee. This is not a unique arrangement since, presently, in the region, several Bar

Associations which regulate attorneys at law, have a similar arrangement, as do a growing number of medical associations.

Exemptions to the annual licensing fee will be made for medical professionals in the public sector.

Provisions on the issuance and revocation of licences will ensure that the principles of administrative law are adhered to and in particular, the principles of natural justice.

### *Categories of Licensees*

Different categories of licenses are envisaged under the new licensing regime. These include broadly : (a) residents and citizens of the TCI, (b) practitioners who do not meet residency status and may practice for shorter periods ( c) interns and other trainees and (d) specialists.

### *Health Regulatory Agency and Appeals*

New legislation also targets the establishment of a Health Regulatory Authority (HRA) to take over the functions currently being performed by the Ministry of Health's Health Regulatory Authority. This Agency will govern all Health Care Facilities.

### *Structure of the Ministry of Health and Administrative Arrangements*

Medical professionals expressed the need for some restructuring of the Ministry of Health and for this to be reflected in the legislation, noting that the Medical Ordinance was now obsolete. The need to encompass medical districts and to define relationships between the public and private sectors will need to be considered.

Similarly, the roles and responsibilities of the CMO, generally and in relation to public health facilities must be precisely defined.

### *Streamline Appeal Board*

The drafts provide for an Appeals Board with authority to overrule decisions of the various specialist medical Boards upon appeal. It is envisaged that the composition of this Board will be multi-disciplinary, with representatives from medicine, the general public and attorneys at law. The latter is particularly important given that the Board will hear matters which may go beyond medical matters and speak to basic contracts, fairness, etc.

### *Relationships with other Sectors such as Environment*

The law reform process also provides for the opportunity to streamline existing relationships between various Ministries and sectors which currently interconnect. A number of overlaps have been identified. For example, dialogue with officials from the various sectors reveals that there is some overlap and lack of clarity in relation to their respective roles and responsibilities where health matters are involved. For instance, apart from Health officials, the Chief Environmental Officer is also involved where matters of sewerage and food safety are in issue. Similar issues are involved with respect to the Department for Agriculture.

The role of the Chief Medical officer, particularly in relation to the regulatory agencies established for health will also need to be concisely determined. These agencies include, e.g. the National Health Service Board, the various medical Boards and the Public Environment Health Board. One view is that this officer should have membership in all Health Agencies. However, this may not be practical given the complex arrangement desired.

Given that the project is also working on legislation on the environment sector, it is expected that such problems can be resolved.

### *Overlap with Environment Public Health*

In addition, health authorities raised a number of substantive issues relating to which relate to the environment and public health. While these are health issues, they fall more legitimately under the Environment (public environment) sector. Since the Environment is one of the targeted listed areas for reform under the EU Legislative Project, it is considered below under the Environment heading.

### *Health and Immigration Matters to be Consistent*

A health policy and consequent legislation must also be consistent with the approved policy guidelines and legislative agenda for Immigration and Labour, which is not currently the case in all instances.

What is proposed is a Migrant Health Evaluation Program which would encapsulate a policy that requires applicants for work permits, resident status etc. to be medically fit. A policy decision must be taken as to the acceptance of medical evaluation reports from countries outside of the TCI.

Under this heading, quarantine Regulations must also be considered pursuant to International Health Regulations. These may also be included in the Port and Health Regulations.

Revenue issues also arise under this heading. Specifically, the entitlements of work-permit holders, immigrants and residents to social health insurance benefits need to be determined and reflected in the law.

### ***HIV and Health Related Immigration Issues***

Currently, there is some disconnect between immigration officials and health officials on some key issues, for example, the question whether an applicant can be denied entry into the country, a work permit, or residency on the grounds of a positive HIV status. The officials from the medical profession suggest that they can be so denied. Such an issue clearly has financial implications, given the health benefits scheme. However, it should be noted that this policy is not in harmony with CARICOM policy, nor the Treaty of Chaguaramus (although this does not bind the TCI) and may be deemed discriminatory. The opportunity is presented to refine the immigration laws to prevent discriminatory practices on the ground of HIV.

### ***Reporting Requirements***

A number of reporting and registration requirements need to be incorporated into the medical legislative regime, in accordance with CARICOM standards, which currently applies to communicable diseases. These include, for example, initiatives toward chronic health surveillance of non-communicable diseases. It is expected that these can be implemented under separate regulations.

### ***Health and Safety at the Workplace***

The issue of occupational safety and health is an important one in the Turks and Caicos. Currently, legislation is outdated and obscure and is not in sync with international standards of safety and health at the workplace. The old regime centred, for example, on protection in narrowly defined places, such as factories. More importantly, safety, as opposed to the broader objective of health, which is viewed as a preventative issue, was emphasised. Officials in the Ministry of Health have therefore called for new Occupational Health and Safety legislation, to address health and safety concerns at the workplace. This is also a concern of the Labour and Environment Ministries, since it concerns also issues of public health and safety. The view was expressed that regulation and compliance in this area is deficient. Notwithstanding, occupational health and

safety is usually regulated through the labour department and this points to another area of overlap between sectors.

It is contemplated that the CARICOM model on occupational safety and health, a model which has been informed by the ILO's model Convention, will be an appropriate one for the TCI to adopt in the current law reform exercise. Such legislation contemplates preventative measures for health and safety, increased representational rights and the promotion of safety committees at the workplace, the latter which will attempt to oversee preventative safety measures. Such modern legislation will speak to all workers, in whatever capacity or workspace and will also aim to bind the Crown.

Further issues relate to health concerns in the environment and are discussed under 'Environment'.

### *Compliance with International Standards and New Legislation on Health*

The above amendments to the existing law on the health regime must also conform to international standards for health, such as the International Health Regulations 2005 and other WHO requirements.

The new legislation is expected to take the form of a Health Regulation and Health Professions Ordinance. A draft of such legislation is currently in an advanced stage and has been approved by the Working Group. The above statute will subsume existing legislation such as the Health Practitioners Ordinance.

### **Regulation and Protection of Crown Land**

The enacting of an Ordinance to implement the new Crown Land Policy has been identified by the interim administration as one of the milestones towards the restoration of democratic government in the TCI. Accordingly, a Draft Crown Land Bill has been drafted to govern the allocation and development of Crown Land in accordance with the Crown Land Policy.

This Draft is at a near complete stage and has already undergone considerable consultation. It should be noted too that the issue of Crown lands is one that has received extensive public attention in the past months. A policy was drawn up, perused by the public with the opportunity for comment and the Consultative Forum and the Advisory Council approved said policy (Crown Land Policy dated 10 July 2011 that was published in September 2011.) Accordingly, the current Draft Bill produced by the EU

Legislative Project Technical Team is aligned to this approved policy. The Draft Bill was formulated with the guidance of technical officers in the Ministry of Environment and District Administration.

The Draft Crown Land Bill was approved by the Working Group at its meeting of 31 October and it is hoped that the Bill will be submitted to the Advisory Council shortly.

The new draft legislation aims to introduce equitable and rational policies for the distribution of Crown lands in the Turks and Caicos. It attempts to correct the noted deficiencies in the existing regime in accordance with internationally accepted standards, balancing market principles with national concerns and expectations, under the rubric of fairness.

The Draft Bill contains two Schedules and an Explanatory Memorandum. It establishes a Crown Land Unit to administer Crown land and sets out the principles and procedures for the allocation of Crown land. Allocation will only be by sale, lease, licence or easement and will be done by the Governor after consulting the Crown Land Advisory Panel, which is to be instituted.

Eligibility for residential land and a discount will be open solely to Belongers aged 21 or more who have not previously been allocated residential Crown land. Land for commercial development will only be available on lease and the development proposals for such Crown land will be scrutinised closely.

### Trafficking in Persons

The issue of the creation of 'trafficking in persons' law has been deemed to be of top priority in the legislative reform process in the Turks and Caicos. This is largely because of the need to protect the international reputation of the Turks and Caicos. Failure to do so could result in the Turks and Caicos being 'blacklisted' by certain countries, with implications for aid and trade. Consequently, while there is no evident problem of persons being trafficked in the jurisdiction, it is exceedingly important to implement legislation which would prevent such a phenomenon, or, if it occurs, for law enforcement to be able to treat with it effectively.

Currently, the TCI does not have provisions which outlaw human trafficking, which is viewed as a human rights violation and a criminal offence by the international



community. This is a subject of international concern and it is in keeping with international human rights standards that it be addressed.

In light of the above, discussions have taken place with officials from the Ministries of Immigration and Labour and Social Welfare, who have all agreed as to the importance of such laws in the jurisdiction. Accordingly, a stand-alone Draft Trafficking in Persons Bill was prepared, which conforms to international and regional norms, while appreciating the domestic realities and constraints of the Turks and Caicos. The Bill is in an advanced stage and has been approved by the Working Group.

Notwithstanding the consensus on the need to have such a law and with respect to the policy objective in relation to human trafficking, there are certain challenges to such legislation. In the main, what is at issue, are the administrative and other logistical arrangements which will have to be made if the TCI is to conform with international standards against human trafficking, including provisions for humane treatment of the victims of trafficking. For example, such persons will need to be housed as they await the return to their countries and airfare and related costs will need to be addressed. This will require careful calibration.

The legislative drafting process also takes into account that regulation and prevention of trafficking in persons will involve several departments and public offices. These include, but are not limited to: immigration department, labour department, law enforcement personnel, social welfare, diplomatic services, coastal and marine patrols, aviation services, child-care, health services, educational services etc. Indeed, it is expected that immigration and labour laws will need to be further adjusted upon the enactment of legislation on trafficking in persons.

It should be noted too, that issues relating to human trafficking have the potential to introduce, important judicial review concerns, both in relation to human rights and administrative law, since the action of the State may be inquired into. Points to note include the burgeoning constitutional jurisprudence on cruel and inhumane treatment which arises out of undue delays in detention. Whilst traffickers are not arrested nor convicted, if they are held in conditions which are deemed to be akin to punishment, this may invoke issues of inhumane treatment. Similarly, issues relating to asylum might be analogous in relation to the treatment that is expected. The impact of the EU rights jurisprudence on these issues will be important to the TCI, giving that it is a territory of the UK.

The new Ordinance will create a number of new criminal offences in the Turks and Caicos and clearly define the concept of trafficking in persons. Liability will accrue not

only in relation to the principal offence, that is, those who traffic persons, but also to those who facilitate or aid and abet such traffickers. It is important to note that persons who offer commercial services, such as housing, transport etc. could also fall under the purview of the new law, where they knowingly assist the trafficker, including where they have 'turned a blind eye' to trafficking, in situations where they were in a position to know that trafficking was taking place.

The Ordinance will be far-reaching in scope, encompassing all ports and carriers. It will also make provision for interaction with foreign governments where appropriate, in order to repatriate trafficked persons, or to retrieve and return persons from the Turks and Caicos who have been trafficked.

The law will treat in a particularly harsh manner persons who engage in the trafficking of juveniles or children and where trafficking involves sexual abuse.

Appropriate enforcement powers and mechanisms will also need to be devised in conjunction with a clearly identified administrative framework. In addition, a decision should be taken as to whether such offences should be criminal or civil.

#### ***Administrative Framework and Procedural Issues***

In addition to the substantive policy decisions which will be translated into law, the new legislative regime must also address the current deficiencies in the institutional framework. For example, there is a duplication of functions between the Immigration Board and the Labour Commissioner, both of whom examine work permit applications and presumably, will have jurisdiction over human traffickers and their victims.

#### **Integrity in Public Life**

Given the recent experiences of impropriety in public life in the Turks and Caicos, the need for improved legislation on integrity in public life is viewed as one of the milestones to be achieved in the move toward good governance. Considerable amendments will need to be made to the existing Integrity Commission Ordinance to achieve such an objective. These will involve amendments in both substance and form.

In addition, other related legislation needs to be considered to supplement the objectives of the Integrity Commission and integrity in public life generally.

As a result of this recognition, the enhancement of the Integrity Commission Ordinance is taking place on a two phased basis within the EU Legislative Project. In the first Phase, amendments listed as urgent, being largely procedural issues such as the requisite forms and Schedules to invoke the full jurisdiction of the law, are expected to take place. In fact, the Director of the Integrity Commission has already noted a number of procedural inadequacies of the Integrity Commission Ordinance which need to be rectified urgently for the work of Commission to be effective and to ensure its full implementation as intended. These have formed the basis of the Phase 1 part of the reform project.

In relation to Phase 1 of the reform of the Integrity Commission Ordinance, the urgent scheduled amendments are at an advanced stage. A Draft Order amending Schedules 1 and 2 of the Ordinance (to be made by the Governor) has also been drafted.

The amendments to Schedule 1 will expand the list of persons in public life who must make declarations under the Ordinance, with two exceptions - the Governor will be removed from the Schedule and the office of Secretary to bodies, boards and commissions established by statute will be defined more narrowly. The amendments to Schedule 2 will make changes to the wording of Forms 1 and 4.

The Commission has decided to move from an annual requirement for filing declarations to a biennial requirement (i.e. filing once every 2 years). Consequently, the Ordinance will be amended to require biennial filing of declarations. An amendment will also be made to give the Commission a specific power to extend the period in which filing may be made, in appropriate cases, for a maximum period of 6 months. Finally, the Governor will be given the power to exempt persons whose offices are listed in the Schedule from the requirement to file.

Further, the Bill will make a number of miscellaneous amendments to the Ordinance including:

- amending the procedure for approval of the Commission's estimates of expenditure so that it conforms with the new Constitution;
- enabling the Commission to hire a secretary who may or may not be a public officer;
- giving the Commission the power to amend Form 1;

- requiring the reporting of gifts, including gifts to family members, of greater than \$1000;
- giving the Commission the power to order a person in public life to place his assets in a blind trust;
- tightening up the definition of “spouse” and the meaning of undue political pressure; and
- clarifying wording and correcting minor errors.

It is expected that Phase 2 of the reform exercise in this area will examine more far reaching amendments in keeping with international practice. The Review will have the benefit of a self-assessment done by the Integrity Commission itself as well as specialised expertise from the EU Legislative Project Technical Team. In other jurisdictions, such legislation has reached into areas such as detailed provisions on the appropriate procedures for the award of public contracts and bidding processes within the context of attempting to make public life more transparent. This may include the provision of websites which would house relevant information.

Other components may include the protective provisions for whistleblowers, including protection of witness programmes. While the TCI is not a signatory to the MESICIC, which is the Inter-American convention against corruption, that body has done substantial work in this area which can be drawn upon for suitable legislative amendments.

The establishment of an Integrity Commission and related legislation should also be in conformity with adequate and modern anti-money laundering and Proceeds of Crime legislation. The latter ensures that confiscation powers are available and efficient.

### **Creation of a Fractional Ownership Scheme**

An entirely new statute and innovative legislative policy has been created to treat with the issue of ‘fractional ownership’, a novel concept in the Turks and Caicos, which, it is believed, will be a significant revenue earner for the territory. Currently, the TCI has two types of ownership designed to attract investment in property. One is regulated by the Strata Titles Ordinance (Cap.75) which provides for the division of properties into strata lots such as flats or condominiums. The other is regulated by the Time-Sharing

Ordinance (Cap.76) which provides for people to buy units of time in a property, usually, but not necessarily, a strata lot.

The real estate sector believes that the market would benefit from the creation of a third type of interest, known as a fractional interest. This offers many of the usage benefits offered in timeshare, but in fractional ownership the purchaser owns a share in the title, not merely units of time. Consequently, if the property appreciates in value, so will the shares and fractional owners can sell whenever they wish, releasing the capital growth from their investment.

The owners of fractional interest acquire a registrable interest, which can be the subject of a charge, that is, they can borrow on it. They also have more of a 'stake' in the economy of TCI and are more committed to its interests.

In March 2011 the Advisory Council agreed that legislation should be drafted to provide for fractional ownership. Thereafter, the EU Legislative Project Technical Team finalised legislation on this subject in the form of a Fractional Ownership Bill, to give effect to these pioneering ideas in land ownership, under the guidance of technical officers from the land registry and in continuing consultation with lawyers in the private sector who had expertise in this area (see Appendix 5). Indeed the private sector had already formulated a draft Fractional Ownership Bill and this was utilised as a model in the drafting exercise. The creation of this new industry is thus very much a market driven one.

While the new legislation aims to promote commercial activity, expediency and revenue earning, there is a commitment to ensuring that consumer interests are protected. Accordingly, the Draft Bill incorporates some 'protective provisions' to avoid potential purchasers of fractional interests being exploited.

It also makes clear the relationship between fractional interest and the Registered Land Ordinance.

On 31 October the Working Group approved the draft Fractional Ownership Bill and authorised further consultations with the private sector, which are now taking place. It is expected that the Bill and its associated Regulations will be submitted to the Advisory Council by the end of the year.

## **Labour and Industrial Relations**

The TCI has a fairly comprehensive Employment Ordinance which was amended in 2004 and which governs all aspects of employment in the Turks and Caicos, with the exception of employment in the public service. In addition, there is in existence a Trade Union Ordinance CAP 135, which is old legislation which is not used since there are no unions in the private sector. It is apparent that despite the relative newness of the Employment Ordinance, it has not kept pace with jurisprudential developments in labour law.

After a comprehensive view of this sector by the EU Legislative Project Technical Team, a number of problems were identified in the review process, some of them very significant. Indeed, it is believed that the relatively high percentage of litigation that the Employment Ordinance, in particular, has attracted, is due to serious deficiencies in the legislation which relate both to substance and form.

The deficiencies in relation to form mainly involve repetition and inconsistencies in the existing legislation. These are easily remedied and not highlighted in this Paper. The more important amendments are to do with substantive changes to the law, the most significant of which are highlighted here.

It is apparent therefore, that the Employment Ordinance needs to undergo fairly substantial reform.

In particular, the following issues need to be addressed:

### **Inadequate Reflection of Key Employment / Labour Law Concepts**

The Employment Ordinance, which is a substantial piece of legislation and governs all of the employment practices in the territory, has attempted to incorporate some important, modern employment law concepts, such as the notions of unfair dismissal, modern forms of summary dismissal, redundancy benefit, constructive dismissal (not identified explicitly), anti-discrimination and the like. This is extremely laudable. However, in several instances, these concepts are not expressed in accordance with established jurisprudential principles and even contradict other provisions and assumptions made in the Ordinance. These are technical concepts which have specific meanings in labour law, often elaborated upon by the courts. The result is confusion, not simply of the terms, but of obligations under the Ordinance.

Part of the confusion surrounding the various concepts appears to be the result of new provisions being added on to the Employment Ordinance in the 2004 reform initiative. During that time, it seems that the Termination (dismissal) and anti-discrimination provisions were added to the existing legislation. Indeed, these new provisions appear to be based on the St Lucia Labour Code formulated in 2002, legislation which contained quite far reaching and in some cases innovative provisions. However, the St Lucia legislation started with no written law on the several subjects, whereas the TCI already had some limited provisions on the various areas. It would have been necessary therefore to either completely rewrite the older sections or to harmonise them, but this does not appear to have been done, resulting in repetitive and often contradictory concepts, as well as the inclusion of new concepts which were not accurately represented in the legislation.

During the stakeholders' meeting, it was agreed that the Employment Ordinance needed to be corrected in several areas, which would bring more clarity and accuracy to the law. A draft of the amended law is already in an advanced stage.

### *Problems with Key Issues of Unfair Dismissal and Wrongful Dismissal*

In the case of unfair dismissal, for example, this is a modern concept which abolishes the long held common law presumptions of employment at will, that is, that an employer could dismiss an employee for no reason, or even a bad reason, provided that he or she gives notice to that employee. Unfair dismissal is now a well entrenched principle in developed labour law regimes. It is a concept that is based on fundamental fairness and has been promoted actively by the International Labour Office (ILO) in its Convention on Termination of Employment, to which the TCI subscribes.

Under unfair dismissal law, a valid reason is required for the termination of employment and the employer is also required to have in place procedural safeguards when dismissing an employee, such as the giving of notice, a fair hearing etc. There is a reversal of the common law position and a dismissal, prima facie, is now presumed to be unfair, unless the employer can establish that he or she had a good reason to dismiss. However, while the Ordinance mandates in Part V, that a valid reason must be given for a dismissal, it treats this as a separate issue from unfair dismissal. In fact, the unfair dismissal provisions are located in a separate Part of the Ordinance and appear to have a different scope.

Further, the notice requirements are somewhat muddled. In unfair dismissal law, whether, or not one dismisses for a good reason, notice is required, since unfair

dismissal incorporates both substantive and procedural elements. Even if one has a good reason for dismissal therefore, if one dismisses without notice, it would be presumed unfair, although it will have lesser implications than a dismissal for a bad reason in terms of damages. Under the common law, dismissal without notice would be termed wrongful dismissal, but would have nothing to do with the reasons for dismissal. Of course, a jurisdiction could decide to change this, but this does not seem to be the intention in the Ordinance. Respectfully, it appears to be merely a misunderstanding of the elements of the concept.

It is perhaps because of this confusion that there have been decisions from the TCI courts reportedly advising that there is no authority for wrongful dismissal because it was not specifically outlined in the Ordinance. It would indeed be the case that the common law concept of wrongful dismissal has been effectively abolished. The reason for this is not that wrongful dismissal is unspecified in the Ordinance (with respect, regardless of what was reportedly said in a court – since the common law is always preserved unless specifically abolished), but more accurately, because wrongful dismissal has now been subsumed under the unfair dismissal presumption.

Further, termination of employment describes the separation of the employee from the employer for whatever reason. Yet the Ordinance treats unfair dismissal separately from other types of termination. Upon inquiry by the Technical Team, stakeholders agreed that the **intention** of the Ordinance was indeed to effect what is known as unfair dismissal law. Consequently, the Project will proceed to rectify the various anomalies and inconsistencies to achieve this result efficiently.

### *Problems with Summary Dismissal and Redundancy Provisions*

The Ordinance also gives a unique representation of the concept of summary dismissal which might be problematic. Moreover the definitions offered are not consistent with each other. In one instance, it is related to ‘occupational requirements’, which would more accurately describe termination on ground of redundancy and not summary dismissal which is established as relating to serious misconduct which goes to the root of the contract.

Further, in some instances, what is described as summary dismissal in the body of the statute would normally refer to wrongful dismissal.

Key concepts on redundancy are represented very differently from their commonly understood legal meanings and it is not clear if the intention was to so substantially



deviate from established labour law principles. For example, it is usually the case that an employee has an obligation not to refuse a reasonable alternative offer of employment. However, the statute speaks only to this obligation in partnership situations. Similarly, a definition of a genuine redundancy situation is lacking and obscures the provisions.

In addition, the redundancy provisions are located in Part VI, which speaks to Unfair Dismissals, whereas redundancy cannot be treated as an unfair dismissal.

The issue of lay-off also needs redress. Currently, there are no lay off provisions, although there are lay off practices and customs in the TCI, especially given that service industry employment is inherently seasonal.

It is therefore recommended that clear lay off provisions be drafted. The exact period that will qualify as a lay -off, as opposed to a redundancy, which invokes severance payment, should be decided. Labour officials suggest a period of **eight weeks?**

In an August 5 meeting with stakeholders in Labour, it was agreed that there is a need to completely re-write the Termination and Dismissal sections of the Ordinance, clarifying the relevant concepts and simplifying the provisions and procedures.

### *Matters of Form - Inconsistencies and Repetition*

In matters relating to form, it is evident that certain obligations are unclear or inconsistent. For example, it is unclear in the Employment Ordinance whether employees in the TCI are entitled to protection from dismissal when they engage in industrial action, in keeping with ILO principles and norms across the region, since the protection given in Part V is taken away entirely in Part VI, under section 77. The August 5 meeting agreed that the intention and policy of the TCI is to protect workers from dismissal and discrimination when they engage in industrial action.

Similarly, the legislation needs to be tidied to rectify certain concepts which are repeated, sometimes in different form. For example, trade union discrimination, contracting out provisions and pregnancy protection are covered under more than one provision. Again, this may be a problem of inserting provisions without rationalisation of other existing provisions.

### *Inadequacies on Jurisdiction and Enforcement and the Role of the Tribunal*

The Ordinance provides for the establishment of a Labour Tribunal, but does not give to that Tribunal adequate or clear jurisdiction. For example, in several instances, it is

unclear whether a person can go directly to the Tribunal to make a complaint. In other instances, standing to go before the Tribunal could be enabled and improved. This is an issue for consideration.

There has also been litigation regarding the interpretation of a 'dispute' which can be addressed before the Tribunal. The intention is surely that any complaint can go to the Tribunal, but this needs to be made certain and the route that a complaint must take clearly indicated. For example, s. 15 suggests that an employee has a right to go directly to the Tribunal with respect to matters concerning the lack of a written contract and particulars, but elsewhere it is indicated that all matters should be referred first to the Labour Department. If a person has a right that a matter be 'referred' to the Tribunal, it must mean that the Labour Department has no real jurisdiction to make any determinations. At most, it acts as a clearing house.

Consideration should be given to the convenience of being able to go directly to a Tribunal. Relevant considerations include the capacity of a Labour Department to handle ALL complaints. Capacity in this case refers not only to manpower, but also to the legal capacity, given that labour departments are without persons trained in the law and often have to handle complex legal issues. On the other hand, there is some logic to having a first stop at the Labour Department, which can weed out lesser issues.

At the stakeholders' meeting, there was much discussion on this point and conflicting views. It was decided that a decision on this point would be made at a later date, after further discussion.

### *Penalties Available for Offences - whether Summary Trial Appropriate?*

Significantly, the Tribunal's jurisdiction with regard to penalties is inadequate and unclear. In particular, the Ordinance repeatedly refers to a remedy by way of summary jurisdiction, which must be interpreted to mean a Magistrates' court and not the Tribunal, which is also the view of the Court of Appeal itself. The result is that there is a lacuna with regard to the enforcement and penalties provisions.

Further, reference is made often to 'the court' (see, e.g. s. 24 (4)), but the term is not defined and it is unclear to which court it refers, or even whether it should be the Labour Tribunal. It is noted that it is not the usual course, nor is it desirable where there is in existence, an independent Labour Tribunal, for matters of substance on employment to have to go to a Magistrates' Court and the EU Legislative Project Technical Team **strongly advises** that this option be deleted from the Ordinance.

It is further advised that deleting references to Magistrates' Courts will in no way diminish the ability of a complainant to take a matter to court, nor does it prevent a judicial review application to review a decision of the Tribunal.

Stakeholders were in agreement with the view of the Team Leader on the need to abolish provisions relating to summary (Magistrates') jurisdiction.

***Including the Crown in the Jurisdiction and Scope of the Employment Ordinance***

An issue which deserves to be considered is to what extent, if any, the Employment Ordinance should include in its jurisdiction, matters relating to workers in the public sector. Given that the EU Legislative Drafting Team is also reviewing the laws relating to the public service, this is an opportune time to assess such issues. Currently, it is unclear to what extent the Employment Ordinance is intended to bind the Crown, since certain parts appear to make that assumption, such as the reference to the constitution and to 'public authority' in the definition of employer, but there is no explicit clause which would do so using normal drafting techniques. An alternative route, which has traction with stakeholders, is to leave such issues to public service legislation.

Hiring and firing decisions, as well as terms and conditions of employment for public servants, are currently covered under separate Public Service legislation and indeed, these have constitutional support and implications. It would be untenable to have two sets of standards (differing) applying to such employees.

Since the EU/ TCI project is also reforming Public Service legislation, the opportunity can be taken to broaden the more protections given to public service employees along the lines envisaged by the Employment Ordinance by incorporating certain carefully selected modern provisions. These, however, would be included in public service legislation and not in the Employment Ordinance. Appropriate expansions would include non-discrimination provisions, including HIV, explicit natural justice safeguards, health and safety provisions (albeit these are currently treated separately) and provisions on 'permanently temporary' contracts. In the case of the latter, this must be carefully considered, but there is precedent in other countries.

Another possible addition to the purview of the Employment Ordinance relates to the position of persons who are employed by the Crown on *contract*, but who are not defined as public servants. This is a very important issue, particularly given that modern forms of employment by the Crown, relies on such contractual arrangements. Such persons are not normally defined as public servants under case law, although the

jurisprudence on this point is very inconsistent, complex and voluminous. As it stands, these persons may be in no-man's land, as their terms and conditions of employment are regulated neither by the Public Service regulations, nor by the Employment Ordinance, since the latter does not, it is suggested, aim to regulate situations where the Crown is the employer. This is an unsatisfactory situation. Some case law in the TCI, e.g. *Thompson v AG* has already treated with this issue, but the results are inconclusive.

It is strongly recommended that this issue be clarified by statute, whether in the Employment Ordinance or the Public Service legislation, or both. The TCI should decide whether special terms and conditions are to be drawn up under the Public service laws, or whether a special provision will be drafted to make it clear that the Employment Ordinance applies to such employees.

### **Consolidation and Expansion**

Some consolidation of important obligations which were enacted after the Employment Ordinance in separate Orders now needs to take place in the text. These include Holiday with Pay, Hours of Work, Sick leave, Minimum Wages etc. in order to make the Ordinance more coherent and cohesive.

The consolidation process will also give the opportunity to tighten up certain concepts and definitions, such as for example, the meaning of 'employee', as distinct from an 'independent contractor'.

Further, certain provisions in the existing Ordinance also need to be strengthened and enhanced. While the Ordinance is substantial, there are some areas that can be enhanced. For example, it is recommended that the anti-discrimination provisions be expanded to include protections relating to HIV. Similarly, the sexual harassment protections may be expanded.

In addition, officials from Labour have also requested that s. 74 of the Employment Ordinance to be reformed to provide for employers' benefits to be a first charge in winding up proceedings. It is recommended that, if agreed, this would have to be undertaken in conjunction with provisions in the Companies Ordinance, which regulated such proceedings. Since the EU Legislative Project Technical Team is also reforming the Companies Ordinance, this can also be achieved if approved.

### *Labour Migration Issues and Migrant Workers*

The issue of migrant work is an important one to the Turks and Caicos, which has a high migrant population. Amendments in this area will, however, have to be undertaken in view of the new immigration policy that is being formulated. In the interim, certain important issues that have been flagged in the EU Legislative Project Technical Team's discussions with stakeholders are mentioned here.

On the question of lay off situations as they apply to migrant workers, there is currently a practice whereby such workers are allowed to work during that period, generally while they are awaiting renewal of permits etc.?

Another issue relates to the current pattern developing where employers are 'employing' foreign persons described as apprentices, who are not regulated under normal work permit rules. This is partly because of the lack of provisions made for apprentices (as described below). However, current law and immigration policy could also address this problem, since such a practice can be used to circumvent the provisions of the law and in reality these are employees. In addition, the fact that they are 'displacing' TCI workers in the process lends fuel to the argument and possible remedy.

Nevertheless, it is recommended that a strengthening of the law by inserting clear provisions on apprentices, including the length of time that they could be employed as apprentices, that they cannot fill substantive posts etc. could rectify this problem.

An efficient administration procedure, which identifies such persons and available posts in the TCI, though registration etc., would also alleviate the problem. This, however, need not be written into law.

As indicated above, immigration issues are key to the law review exercise and have an important impact on labour questions, so that there is some overlap here. However, the Employment Ordinance has not kept pace with this reality. For example, most workers and entrepreneurs are 'non-belongers', yet the Employment Ordinance speaks mainly to 'belongers';

It should be noted that although this issue was not raised specifically in the discussions, these deficiencies also spill over into the Social Security Scheme, since the entitlement to benefits will also depend on status.

Certain administrative and procedural issues also need to be resolved in the law reform process. For example, there is uncertainty on the question of the responsibility for the repatriation fee – whether employer or worker?

Similarly, clear appeal mechanisms which accord to the principles of natural justice, need to be devised when a work permit extension, or other application in relation to immigration status is denied. Ancillary questions relate to whether persons who have applied for a stay or work permit and been denied can continue to remain in the jurisdiction while an appeal is pending. Good administrative practice may require a speedy review and may also require that the applicant be permitted to remain in the jurisdiction pending the appeal. Indeed, the Team Leader was informed that there is in existence a judicial decision that has ruled along those lines. However, this decision (unreported) has not yet been forwarded to the Technical Team.

The solution may well be an administrative one, to ensure that there is a speedy resolution of such review cases, without a backlog. However, the expedition of such review hearings may require increased staff etc. These are not necessarily legislative matters, although the law could stipulate that a review must be heard within a specific time period. The onus will then be on the authorities to ensure that there are adequate resources to meet the requirements of the legislation.

A suggestion has been made to include a civil servant in the Tribunal. However, the Full tribunal may need to hear a review hearing. Questions concerning whether the President of the Tribunal has the authority to act alone as he has been given the power to do, have been assessed, particularly in light of reported problems of delay so as to make the work of the Tribunal more efficient.

### ***Permanently Temporary Contracts***

The phenomenon of what may be termed ‘permanently temporary’ contracts is problematic. These are contracts which are stated to be temporary, but which are repeated consecutively with the intent of avoiding obligations under the statute. To prevent such abuse, there needs to be a presumption to disprove intent enshrined in the legislation. The current provision, s. 3(7) appears to move in this direction, but it fails to achieve that objective, because it limits its operation to s. 107 and s. 69, which speak to migrant workers and at best, is confusing.

The EU Legislative Project Technical Team further recommends that there should be a broad protection against such contracts, which should include legitimate migrant workers. Since migrant workers are regulated by work permit provisions there is no

potential for abuse and conflict and the s. 69 and 107 provisos are therefore unnecessary and counterproductive.

### *Criminal Liability*

The question of what, if anything, should qualify for **criminal liability** under the Employment Ordinance, is unclear and is not clarified by the current section 30.

### *Time Period for Incapacity*

Of particular note to members of the public would be proposed provisions for qualification of 'incapacity' for work as a result of sickness, injury? These would speak to a time period for illness after which the employee is treated as incapacitated?

### *Inspectorate Powers and Privilege against Self-Incrimination*

Currently, ss. 31 and 98 of the Employment Ordinance provides for the right to be silent, otherwise known as the privilege against self-incrimination in relation to the powers of the inspectorate. This means that where, on inspection, documents etc. are requested, a person can refuse to answer questions or produce the requisite documents. In other CARICOM jurisdictions, the privilege against self-incrimination is only enshrined with regard to **criminal** liability and is constitutionally protected only (that is, for actions by the Crown), not for civil liability, as under the Employment Ordinance. It is unclear what the position will be under the new constitution. While it is protected in some instances elsewhere for civil matters, this is strictly defined. This would make a mockery of the inspectorate's powers and it is recommended that such clauses be removed.

### *Tribunal Procedures and Scope*

It is reported that there are sometimes difficulties receiving judgments from Tribunal members. Consequently, a proposal has been made to make it mandatory for Tribunal judges, not only to give reasons for their decisions, but to give their judgments in writing.

### *Informal Work and Independent Contractors*

Modern labour law must confront unorthodox employment situations such as informal work, seasonal work and even in some cases. Persons working in such situations are not covered under the labour laws such as the Employment Ordinance. It is recommended

that policy should include these. Already, these issues are being faced by the Tribunal, e.g. in *Cumberbatch v Central*, but there are gaps in the law.

An important related question concerns whether the Tribunal should be made to have jurisdiction over matters concerning independent contractors and whether such workers should be covered under the law in relation to health and safety and non-discrimination, for example? Section 46 should be considered.

### ***Paternity and Maternity Allowances***

Maternity allowance is currently inconsistent with NIS provisions and should be harmonized to the ILO standard of 14 weeks. More contentious, however, is the issue of paternity leave. There is a view expressed that this should be provided?

### ***Need for Child Labour provisions; (see also Children law);***

New legislation on children and labour must conform to the provisions of the International Convention on the Rights of the Child, which also includes provisions against child labour. One issue that has arisen in other Commonwealth Caribbean jurisdictions is the inconsistency in various statutes with respect to the ages of persons deemed as 'children' or juveniles and the differing standards applied to them. This will have to be reconciled. In addition, the TCI would need to consider whether any allowances with respect to work should be made, for example, a child doing a newspaper round.

the provisions relating to child labour should also be streamlined with occupational health and safety provisions. It should be noted that the law reform project is also addressing juvenile law issues which will impact on this subject.

### ***HIV and Non-discrimination provisions***

Labour officials saw the need for provisions prohibiting discrimination at the workplace. This would necessitate non-discrimination or equal opportunity legislation. However, the Employment Ordinance Amendment of 2004 did, in fact, introduce some provisions on non-discrimination. What is proposed now is an expansion of this initiative. A modern law on this subject would normally provide for broad prohibitions against discrimination in employment on certain designated grounds, such as race, religion, gender, political affiliation, equal remuneration for work of equal value, sexual orientation, pregnancy and HIV. In addition, it should encompass prohibitions against



sexual harassment, under the modern concept, which is a 'hostile working environment.'

There is now a wide jurisprudence on non-discrimination in employment. Certain key concepts such as a duty to accommodate difference, (a technical concept), provision for liability where the impact, as opposed to the intent of the conduct is negative (the concept of indirect discrimination) and the establishment of limits or parameters such as undue hardship on the employer. In other jurisdictions, the law also lays down certain exceptions to discriminatory conduct such as where there is a genuine occupational qualification for the conduct.

Some Commonwealth Caribbean jurisdictions also make specific exceptions for religious institutions.

On the specific question of protection against discrimination on the ground of HIV, it is noted that the medical profession has already made a request for specific legislation on this issue. However, such a provision can easily be incorporated into a general anti-discrimination statute, the model which CARICOM is now tending toward, instead of specific legislation and this has been recommended to stakeholders. This statute can move beyond the boundaries of the workplace, to include housing, education etc. It has been noted previously that HIV is already a contentious issue in the law review exercise since a request has been made from the Health authorities to enact provisions that will make HIV a ground for denying entry into the country, whereas this is not the position of the Immigration authorities. The proviso for discrimination, undue hardship, is viewed as a limit which can override anti-discriminatory discrimination. However, this would be a high threshold to cross if applied to the HIV issue, particularly, as medical treatment for HIV now benefits from much lower cost drugs.

In keeping with the above, if HIV status is included as a ground of anti-discrimination, should it be lawful to require anyone to declare his or her HIV status, or take an HIV test?

It should be noted that the Team Leader was approached separately to give technical advice on the appropriateness of a separate anti-discrimination statute on HIV, a project which was being contemplated in the Turks and Caicos. She advised that a separate schema was not advisable for the jurisdiction given its resource constraints and the fact that legislation that will be affected most by such discriminatory practices would also be reformed, thus presenting the opportunity to include relevant provisions in various

statutes, such as in relation to employment, health (the voluntary code of practice), education, immigration and public service laws. This advice has been accepted.

### ***Protection on Ground of Industrial Relations Practices***

Protection against discrimination on ground of trade union affiliation should also be protected. This would mean that employees in the TCI would enjoy protection from dismissal and other discrimination, where they engage in industrial action, in keeping with ILO principles and norms across the region? (*Angela Tucker v Beaches*).

Such provisions can form the subject of specific and separate legislation, or may be incorporated as a separate Part of the Employment Ordinance. It is suggested that a separate Ordinance will highlight the importance of this subject.

### ***Provisions outlawing human trafficking (as noted above).***

### ***Due process, or procedural mechanisms.***

A request has been made for provisions on the appropriate procedures for Unfair Dismissal to be incorporated into the Ordinance. This speaks to the issue of natural justice safeguards which are well recognised internationally. Provisions will need to be inserted which speak to the entitlements to warnings, notices of the charge, fair hearing and the lack of bias.

However, it is to be noted that natural justice is an evolving concept and cannot be satisfactorily represented in full in legislation. The provision can seek to be merely a guide to this dynamic concept. Alternatively, the Ordinance can remain silent as to specific procedures and simply state that the individual is entitled to natural justice protections.

### ***Possible Constitutional Deficiencies***

The list of areas for review states that the "Employment Ordinance needs to be reformed to ensure compliance with the Constitution and ILO standards". However, on a preliminary perusal of the Ordinance, no constitutional inconsistencies have been unearthed. Further, constitutional deficiencies have not been identified in the discussions with Labour department officials. It should be noted further that, with the exception of employment in the public sector, constitutional concerns do not usually arise in employment since such activity is in the private sphere whereas the constitution concerns itself with the public sphere, i.e. actions of the state. The exception would be

where the State promulgates legislation which is ultra vires the constitution. Such concerns will, however, arise if the Employment Ordinance is amended to provide for public servants in certain instances, or for state employees on contract, as described above.

### *Promotion and Enhancement of Industrial Relations Standards*

In dialogue with officials from the Department of Labour and other officials, the desire was expressed for the introduction of laws which would shepherd in and encourage good industrial relations practices in the TCI in accordance with international standards. Such laws will entail the promulgation of a Trade Union recognition law, the introduction of Enforceability of the Collective Agreement legislation and laws on Collective Bargaining. Law reform in this area would also involve a considerable expansion of the Trade Union Ordinance to include protections and obligations of unions and employers and their organisations. These issues are still in discussion.

### **Improvements to the Land Registry and Land Registration**

While the Turks and Caicos has had a functioning Registered Land Ordinance (Cap.72) for a long time, a number of deficiencies in the operation of the Land Registry and in the administrative structure of the Office of the Registry had been identified. These needed to be rectified in order to improve the efficiency of the department. In addition, the law reform process provided the opportunity to modernise the department, bringing it in line with international best practices.

In view of the above, a number of amendments have been drafted as advised by the Registrar of Lands (Ag) and other senior Ministry officials in the land registry.

Of particular note are the following amendments:

- a provision giving the authority for the delegation of the Registrar's powers in order to make the work of the department more efficient;
- a provision for the appointment of Assistant Registrars as well as Deputy Registrars;

- new provisions which allow for the service of documents to be done by electronic means, i.e. by e-mail or fax;
- a provision giving authority for the land register to be held in electronic format.
- a provision to enable the Registrar to maintain the land registry records in electronic format, and to publish information and standard forms on a website.

It is expected that as soon as the Ordinance has been amended in the manner itemised above, the Land Registry will start using a new series of forms to replace those in the Third Schedule of the Registered Land Rules. These can then be added to a website for downloading as soon as the expected website is developed.

In addition, the opportunity has been taken in the Draft Amendment Bill to correct two anomalies in the powers of the Registrar. At present only a court can make an order extinguishing an easement, but this is usually done when the easement is no longer needed and it is appropriate for the Registrar to be able to do it. The Bill amends section 97 of the Ordinance accordingly.

By contrast, the Registrar at present has power to order a partition of land owned in common. This usually arises when there is a family dispute and it would be more appropriate for the courts to adjudicate on such matters. The Bill therefore amends section 103 of the Ordinance to remove the power to partition land currently residing in the Office of the Registrar to the courts.

A further amendment made by the Draft Bill is to impose a restriction on the level of fees that can be prescribed, in line with the policy stated in the Crown Land Policy that fees should not deter persons from seeking information about land.

The Draft Amendment Bill was discussed and approved by the Working Group on 31 October.

### **Upgrade of the International Financial Sector**

The Turks and Caicos is one of several jurisdictions in the Commonwealth Caribbean which defines itself as an 'international financial centre'. As such, its legislative infrastructure includes a number of specialist financial laws which cater to non-resident investors, some of whom choose to invest because of the friendly tax incentive regime.

Of particular note are the strict confidentiality laws and norms which obtain in the international financial sector.

Notwithstanding, in recent times, international or offshore financial centres have come under intense scrutiny and arguable hostility from 'onshore' countries and international organisations such as the Organisation for Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF). The main criticisms levelled at international financial centres, including that of the Turks and the Caicos, are the ability of its tax friendly laws to conceal investments from onshore taxing authorities which may wish to levy taxes on such investments and possible enhanced opportunities for concealing transnational crime. The most targeted aspect of the international financial sector is its confidentiality laws and norms.

As a result, recent international initiatives have sought to erode such confidentiality norms by way of bilateral and multi-lateral treaty arrangements which attempt to emphasise international legal assistance and disclosure efforts. The most significant of these efforts involve the OECD's Model Tax Information and Exchange Agreement (TIEAs) which most, if not all, international financial centre jurisdictions, including the Turks and Caicos, have signed onto. As such, domestic laws need to be modified to meet the obligations of this treaty arrangement and other similar international initiatives.

There is some overlap in this subject area with that of company/ commercial law, which is domestic in focus. In the main, this concerns the need to strengthen the Companies Ordinance and related legislation to protect further against potential money laundering, poor regulation and serious crime. These will be discussed separately, under the section dealing with the Companies law and related commercial laws.

A number of existing legislation is expected to be amended in the law review and reform exercise and some new laws drafted. These include:

- the Confidential Relationships Ordinance;
- the Companies Ordinance, which straddles both domestic and international business companies (IBC's);
- an International Trusts Ordinance;
- the Investment Dealers and Mutual Funds Ordinance;

- Proceeds of Crime, which includes Anti-Money laundering provisions; and
- the Tax Exchange of Information Ordinance.

In view of the above, one of the main objectives in the legislative review and reform process in this sector is to meet the imperatives of the current Peer Assessment exercise as 'mandated' by the OECD. A secondary objective, no less important, is to enable the Turks and Caicos to manage the anticipated fall-out from meeting those imperatives by adjusting its legislative framework to enable the international financial sector to be competitive, despite the more restricted environment with which it will have to operate.

In July 2011, the EU Legislative Review Project participated in the OECD Peer Assessment Exercise, which is an initiative under the TIEA regime. This is an initiative designed to shepherd the TCI's international financial sector in the direction expected as a responsible financial sector. As such, several issues are already identified and a couple have already been resolved by Order of the Governor. The EU Legislative Review Project will continue this process.

As a result of the OECD Peer Assessment initiative, the TCI is expected to amend its laws and administrative practices to conform to the aims and objectives of the newly ratified Tax Information Exchange Treaties that it has signed with various countries in accordance with the OECD's thrust toward greater transparency and information sharing between countries. The law reform process should take into account all international financial products and identify loopholes that make the goals of information sharing unobtainable or difficult. There is a broad objective of eroding the stringent confidentiality norms in the sector to encourage greater transparency.

The issue of financial services in the current climate is a sensitive one, fraught with tension. The question of what has been described as a regulatory exercise being demanded in the international arena is a complex, since the relevant legal principles, which inform it, are not uniform. More importantly, steps taken toward more restrictive measures for the sector will possibly result in decreased revenue for the Turks and Caicos and contradict another stated objective of the law reform exercise. Currently, the Turks and Caicos financial services sector follows established legal precedents familiar to and accepted by the courts of the UK and some of these will have to be overturned in such an exercise, depending on the legislative direction being contemplated.

In addition, the law reform process will be geared toward creating new investment opportunities in the sector, taking into account the changed financial climate of information sharing. A number of other offshore financial jurisdictions in the region are in the process of devising new financial products, including captive insurance products, to offset the many challenges that this sector currently faces. The Turks and Caicos will need to take abreast of these new financial products and devise new ones in order to remain competitive.

### *Trusts Law*

The legislation which regulates international trusts in the Turks and Caicos needs to be updated to keep pace with the several commercial initiatives that have taken place in the international financial sector. Key issues concern the need to incorporate dynamic provisions on conflicts of laws issues which can meet the demands of investors from civil law jurisdictions that do not recognise the trust, a common law concept, in their own laws. These provisions should speak to the proper or governing law of the trust, the recognition of the trust, exclusive jurisdiction clauses and enforcement provisions. Some other jurisdictions have also introduced special provisions relating to trustee liabilities which need to be considered for inclusion in the Turks and Caicos.

In other jurisdictions which have been assessed under the OECD regime, perceived weaknesses in relation to confidentiality have been criticized by that body. It is therefore anticipated that trusts law will have to be examined in the review of the international financial services sector. Notwithstanding, the confidentiality mechanisms in offshore trusts, as they are known, are largely consistent with those in onshore trusts which are found, for example, in the UK, the latter which are viewed as legitimate. The TCI would therefore need to determine whether it wishes to disturb such established principles of law in its desire to meet the imperatives of the OECD peer assessment.

### *Captive Insurance*

It should be noted that the OECD assessments have been less hostile, relatively speaking, to the captive insurance industry which makes up a part of the financial services sector. This jurisdiction should therefore inquire into the feasibility of expanding this sector in the thrust toward devising new financial products.

### *Adequacy of the Anti-Money Laundering Regime*

Anti-money laundering and Proceeds of Crime legislation are deficient in certain respects and need to be streamlined with respect to the administrative schema which should be established, e.g. in relation to the scope of the law with regard to Not for

Profit Organisations (NPO's), Insurance and Mutual Funds. The lack of a coherent administrative schema could result in some entities escaping anti-money laundering requirements.

The OECD has also pointed to certain loopholes in the failure to hold adequate information on all financial entities. This would need to be addressed. Of note too is the need to include adequate seizure and confiscation powers in the anti-money laundering regime, while at the same time ensuring that standards such as reasonable suspicion are met. Such provisions will ensure that dual criminality obstacles in international legal assistance are not detrimental to legitimate requests.

The international anti-money laundering regime is a proactive one with the FATF increasing and streamlining requisite obligations. Domestic legislation needs to be reviewed to ensure that it is in accord with this regime, including the important administrative arrangements, such as the need for licenses, returns, deposits, compliance officers, etc.

#### *Non-Substantive Issues - Revenue Earning and Enforcement*

The revenue earning capacity for international financial products should also be inquired into, for example, to examine the fees charged and the duration of tax exemption provisions.

Similarly, the enforcement provisions of the legislative regime which establish the international financial regime need to be re-examined. For example, officials in this sector have expressed the view that fees for non-compliance are too low;

#### *Incorporation and Interpretation of Tax Information Exchange Treaties*

In addition, it is suggested that the law reform process will need to review and evaluate carefully the provisions of the Tax Information Treaties, to determine the parameters of its obligations, in particular, the 'reasonably foreseeable' provisions.

For example, one live issue that has arisen relates to the question of the permissibility of automatic submissions of information under the Treaties. It is suggested that this should be considered within the context of the OECD Model Convention on Tax Information Exchange, which is the model used for the TCI treaties. Under Art 26 of the OECD model treaty, which is described as the 'international standard', automatic submission would be a more ambitious standard than that required, since the term used for the exchange of information, and that adopted by the TCI, is 'forseeably relevant'.



Even under this standard it is accepted, for example, that fishing expeditions should not be permitted, as this would be too wide an ambit for exchanges of information, affecting persons who are not the subject of any inquiry. Automatic submission would reach even beyond this parameter.

Certain technical concepts embodied in the OECD Model Convention are not identically reproduced in the legislation incorporating that treaty. This has already produced some concern and the opportunity will be taken in the law reform exercise to review the language employed in this enabling legislation.

In addition, treaty obligations do not override constitutional interests. Switzerland, for example, has used such provisos effectively to avoid information requests that have been regarded as too invasive and unjustified, while still respecting the legitimate needs of law enforcement. This should be taken into account in the law reform process.

In similar vein, legislation incorporating the legal professional privilege exception of the model Convention is absent in the incorporating law and needs to be addressed within the context of a uniform and coherent approach to the legal framework in the international financial sector.

### **Companies, Commercial Entities and Investment**

Certain key legislation in the commercial sector has already been identified in the List of Areas for Review, as being in need of reform. These will involve the following legislative initiatives:

- amendment to the existing Companies Ordinance, which also straddles international business companies;
- better provision for Securities;
- reform leading to an efficient Investment Dealers and Mutual Funds Ordinance;
- amendment of the Proceeds of Crime Ordinance, which includes Anti-Money laundering provisions for financial entities; and
- the creation of a Not For Profit Organisations Ordinance;

### *Framework for Reform of Company and Commercial Law - Outdated Law*

The company / commercial law framework for the Turks and Caicos has been identified by both stakeholders and the EU Legislative Project Technical Team as outdated and thereby lacking in important jurisprudential content. It is therefore ripe for legislative review and reform. This is particularly the case with respect to the existing Companies Ordinance, which regulates both IBC's and local companies. This Ordinance is consequently of particular note to the law reform exercise and several of its deficiencies have been highlighted. It has further been identified as fragmented, containing much duplication and several loopholes with respect to compliance and efficient regulation.

The Companies Ordinance was first enacted on 20 January 1982 and it is in general based on the state of UK companies legislation at that time. It has since been amended 17 times, most recently, it appears, in 2007, to accommodate the establishment of the Turks and Caicos Financial Services Commission.

By way of comparison, since 1982, there has been major new consolidating company law legislation in the UK, in 1985 and, most recently, in 2006. In the Commonwealth Caribbean, there has also been extensive company law reform in Barbados (1985), Trinidad & Tobago (1992), Antigua & Barbuda (1995), St Kitts (1996), Montserrat (1998), Nevis (1999), Anguilla (2000) and Jamaica (2004). Much of this legislation has drawn heavily on sources and models from the wider Commonwealth, particularly Canada. It may be of further interest to note that, even in British overseas territories, such as Anguilla and Montserrat, the legislators have felt able to look beyond the UK models in search of an appropriate framework for reform.

Some of the main legislative tasks noted for action are contained in the following, by no means exhaustive list:

- (a) clarification of the status of the *ultra vires* rule;
- (b) removal of procedural obstacles to, and expansion of, the remedies available to disgruntled minority shareholders;
- (c) provision for company 'buy back' and, if needed, financing of the purchase of its own shares;

- (d) provision for companies other than exempted companies to issue redeemable (as distinct from redeemable preference) shares;
- (e) duty of care and extent of the liability of directors;
- (f) the broader issue of corporate governance generally;
- (g) reform of board meeting procedures (to accommodate, for example, telephone participation by directors);
- (h) refinement and simplification of shareholder democracy processes, particularly in small and private companies, with a view to more efficient decision-making and streamlining internal administration;
- (i) tightening of rules relating to company names;
- (j) tightening of rules relating to the keeping of accounts; and
- (k) simplification of the approval process for forms for use by companies in connection with required 'filings' with the Registrar of Companies/FSC; and
- (l) provision for publication of forms on a website, electronic filing and service of documents.

***Limited Scope and possible need for stand-alone legislation***

In addition, the Companies Ordinance fails to include in its scope, either at all, or effectively, certain important entities, such as Not for Profit Organisations (NPOs'). Similarly, there is an absence of appropriate provisions for insolvency. This means that such organisations and situations are not adequately regulated. In particular, there is an absence of reporting and filing requirements for such entities. The need to provide for an adequate legislative framework for securities and mutual funds, two relatively sophisticated and modern financial/ commercial concepts, is also identified. These legislative gaps may point to the need for legislation separate and apart from the Companies Ordinance.

### *Legislation Regulating Not For Profit Organisations*

Specifically in relation to NPO's, the persons responsible for administering company law in the Turks and Caicos have advised the EU Legislative Review Project that they are of the view that such entities are not adequately regulated under the Companies Ordinance. In fact, most NPOs do not even bother to register under it. Aside from the lack of transparency for donors and the public, failure to register has had some negative consequences for NPOs in the past. For example, several organisations were inadmissible to receive international aid offered after the last hurricane because they were not registered as a charity; in some instances NPOs have also been denied Customs exemptions available to charitable organisations simply because of a lack of documentation to prove their eligibility.

The lack of adequate regulation and oversight of NPOs in TCI also makes us vulnerable to international criticism. Recent recommendations from the United Nations Financial Action Task Force (FATF) require countries to regulate and protect their NPO sector; in particular, the recommendations require supervision and monitoring of NPOs to ensure that they are not used to promote terrorism or hide money-laundering. In order to maintain TCI's international reputation and continue to attract international investment, we must endeavour to comply with the FATF recommendations. As noted above, such organisations also come under scrutiny as a result of the OECD Peer Assessment exercise where transparency is viewed as paramount. This means amending domestic legislation to promote financial transparency, integrity and public confidence in our NPOs, and to provide for effective supervision and monitoring of the sector.

The EU legislative reform project has had preliminary talks with officials at the Financial Services Commission on what kind of regulatory structure is needed for NPOs and is reviewing recent legislation regulating them in other jurisdictions. The project is also reviewing the FATF recommendations respecting NPOs and legislative measures taken by other countries in the Caribbean to implement them.

### *Licensing Transparency*

Other inconsistencies, such as the deficiencies in relation to the licensing regime, in particular, the need to update the stipulated categories of financial entities that can be regulated under the statute, must be addressed.

The parallels with legislative reform in the international financial sector have already been noted above. For example, the question of beneficial ownership and information on shares and directors as are provided for under the Companies Ordinance are of particular relevance to the OECD Peer Assessment, discussed above and the Companies

Ordinance and other existing legislation will need to be carefully examined on this issue.

Consideration will also be given to formulating legislative standards for the regulation of charitable and religious organizations which collect revenue. These fall under anti-money laundering provisions, but can also be viewed separately.

### *Piecemeal Approach or Total Rewrite*

Given the enormity of the task to provide for a complete overhaul of the commercial law sector with a view to providing for modern, coherent and comprehensive legislation, the Turks and Caicos is faced with two possible choices: (1) to make piecemeal amendment to the existing Ordinances with a view to enhancing their effectiveness; or (2) engage in a comprehensive rewrite of the Companies Ordinance and related laws.

In the view of the EU Legislative Project Technical Team, while it may well be possible to make an attempt to address some of these areas with an eye to reform in the relatively short term, the question is whether a continuation of the piecemeal approach to company law reform that has produced the fragmentation and duplication in the current regime, is the most desirable thing for the commercial environment of the TCI at this time. It is suggested that the reform impetus that has already altered, in some cases radically, the basic shape and structure of company law in the UK and throughout the region over the last 25 years could well produce significant benefits for the TCI, especially at this critical juncture in the islands' history.

At this juncture, the EU Legislative Project Technical Team is dialoguing with key Ministry officials and other stakeholders in order to finalise an appropriate legislative reform agenda, with a view to achieving a "modern law supporting a competitive economy, in a coherent and accessible form, providing maximum freedom for participants to perform their proper functions, but recognising the case for high standards and for ensuring appropriate protection for all interested parties" (UK Company Law Review consultation document, 'Modern Company Law for a Competitive Economy: the Strategic Framework', para. 2, quoted by Mason, French & Ryan on Company Law, 2008 - 9, para.1.5.1.3).

Nonetheless, the Team is more weighted in favour of a complete rewrite of the companies law, to bring it into line with modern practice in the UK and the region", believing that the aims of achieving greater efficiency and transparency in company law

legislation, directed at the creation of new investment opportunities in the financial services sector, is better served by a redesign of the current legislative framework, based on a careful and reflective study and assessment of the needs of the sector and the territory as a whole.

### ***Project to Outline Legislative Proposals***

Notwithstanding the above, the EU Legislative Technical Team is cognisant of the fact that such a comprehensive overhaul of company/ commercial law could not be completed during the lifecycle of the current EU legislative project, in the sense of producing final draft bills. Accordingly, it is proposed that comprehensive drafting instructions be produced as the basis for a cogent, continuing law reform programme on company law for the Turks and Caicos. Such legislative proposals would take into account legislative models in the UK and the Commonwealth Caribbean region. This, it is suggested that is a more satisfactory long-term solution than piecemeal amendments to the existing Ordinances, or even a consolidation of the existing law.

### **Juvenile Justice and the Rights of the Child**

The EU Legislative Review and Reform project will undertake to introduce a modern and comprehensive legislative framework to protect the rights of juveniles and children in the Turks and Caicos. This will include a special judicial regime for juvenile offenders. The philosophy behind the expected new law is that juveniles need special care and protection and where they have been brought before the formal justice system, they should not suffer harsh, punitive measures. The new legislation is premised on the OECS Model Laws on Juveniles.

The new legislation, a proposed Juvenile Justice Bill, which is already in an advanced stage, aims to meet the standards and norms given effect in the United Nations International Convention on the Rights of the Child, the UNICEF Convention. That instrument emphasizes the rights of the child to dignity and to protection under the law. An important feature of the UNICEF Convention is to put in place a legal system whereby juveniles are treated in a humane way and every attempt is made to insulate them from the harsh realities of a criminal justice system. To this end, the principles of rehabilitation and protection are prioritized. It is this aspect of the UNICEF Convention that is incorporated in the Juvenile Justice Bill.

### **Relationship with other Legislation**

It is to be noted that the provisions of the Juvenile Justice Bill will complement other legislation being formulated in the Turks and Caicos on the subject of children and juveniles, such as the Status of Children Bill, which has as its main aim, the abolition of discriminatory effects on children who are born out of wedlock. Such other legislation is also being spearheaded by the EU Legislative Project. The Juvenile Justice Bill will also work hand in hand with other relevant legislation such as the Children (Care and Protection) Ordinance and provisions on probation.

An important piece of ancillary legislation is the Criminal Procedure Ordinance (CPO), which lays down wide ranging provisions for criminal matters in the Islands in general. For example, s. 12 seems to be creating a dual jurisdiction. A police officer can choose whether to arrest under this Ordinance or under the CPO. Where the arrest/ summons power originates under the Juvenile Justice Bill, it is subject to the discretion of the AG, under s. 11 (2), to determine whether the matter should be set down for a preliminary hearing. However, no such restriction appears to be in place if the arrest powers under the CPO are utilized.

It is suggested that provisions found in other relevant statutes, such as the Criminal Procedure Ordinance, will need to be adjusted to reflect the now more pointed aims of the Juvenile Justice Bill.

### **Substantive Matters to be Decided**

#### ***Care and Protection of Children***

The Bill proposes to abolish existing legislation on juveniles and replace such legislation with a 2 step approach to juveniles and children - an Ordinance dealing with juvenile offenders and another Ordinance dealing with the social welfare aspects of juveniles before the law. It should be noted that in most other jurisdictions, juvenile justice deals with both juvenile offenders and juveniles who are in need of care and protection under a single piece of legislation, such as Children and Young Persons In the TCI, this is separate and it needs to be made clear whether this will continue to be so.

The Juveniles Ordinance currently houses the provisions for juvenile justice. However, 'justice', that is, the bringing juveniles who are accused of committing offences before the justice system, is only one component of the necessary jurisdiction. There is also another important component, that is, having jurisdiction to take children who are in need of care and protection before the formal legal system in order to protect them. This is a wide and *ex proprio motu* jurisdiction, for example, children found wandering. The Juvenile Justice Bill does not incorporate any provisions to substitute for this jurisdiction. Under the proposed Bill, the child welfare system may only kick into effect after a hearing by the new Juvenile Board. The Children (Care and Protection) Ordinance is also not wide enough to make this substitution. This is a serious gap in the system to address issues relating to children and one which falls short of the international standards and must be rectified.

### ***Bail Procedures***

The Bill proposes strict regulatory provisions in relation to bail. There are several types of bail known to the common law, including the notion of bail as a surety, where money or property is given in exchange for temporary freedom. There is also police bail, which in the UK, is not linked to money and property. However, the Bill does not make the concept of bail used clear. It is uncertain whether the provisions for police bail can operate in the same way as it does in the UK.

As far as Juveniles are concerned, police bail is granted under section 31 of the police force ordinance. Other bail is granted under section 16 of the Juvenile ordinance.

Further, recent developments in the UK relating to the time allotted for police bail will need to be reflected in the Bill to ensure its constitutionality.

### ***Establishment of Juvenile Board and Appointment of Board Members***

The original Draft Bill, which mirrors the OECS model, establishes a Juvenile Board to hold preliminary hearings with a view to diverting the juvenile from the formal criminal court system. The exact status of this body is unclear. While it is called a Board, and not a Tribunal or court, it is comprised of at least one Magistrate and is described as a court in the body of the Bill, when its powers are being referenced. It has wide



discretionary power including penalties which can have the effect of depriving a juvenile of his or her freedom, albeit not in a prison. It is therefore suggested that this body will be treated as akin to a court in constitutional law since it wields what can be described as judicial and not merely administrative powers.

This is an important point since it has implications in constitutional jurisprudence for how appointments to this body can be made and related issues. Currently, the Attorney General /Minister are given wide powers to appoint such persons. However, the power to appoint the judiciary does not reside in a Minister or the Attorney General, members of the Executive. This is a violation of the separation of powers principle.

While a Board is an option, the TCI may wish to consider instead a special division of the Magistrates' court and co-opt social workers and other desired officials as Magistrates, bearing in mind that magisterial jurisdiction may be exercised by persons who are not lawyers? Alternatively, the inconsistencies in the law can be cured and it be made clear that this is not a judicial body.

In consultations with stakeholders from social welfare, they were of the view that there juveniles already have difficulty affording respect for the courts of law, so that having a substitute Board will undermine the authority of the entity responsible for juvenile justice. These stakeholders preferred the option of a Magistrates' Court. While the EU Legislative Project Technical Team appreciates the innovation demonstrated in the OECS model, which the TCI has stated that it wishes to adopt, it finds value in keeping a magisterial court system for hearing juvenile matters.

This is particularly important since the Board has jurisdiction to 'hear' matters in situations where the juvenile has not been charged for any offence, but has merely been 'warned', though that juvenile's liberty may be taken away if found 'guilty.'

### ***Powers under the Criminal Procedure Ordinance vs. Powers under the Bill***

There is some confusion as to how certain powers already listed under the Criminal Procedure Ordinance are to be exercised. For example, the issue of summons is handled under this Ordinance, but the new Bill attempts to define and regulate these powers itself as they would relate to juveniles.

International standards under the CRC contemplate:

37 (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

40 (2)(b) (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

### *Age of Criminal Capacity or Responsibility*

In every jurisdiction there is a minimum age under which a person (deemed to be a child) cannot be prosecuted for any crime. This is known as the age of criminal responsibility. In discussions with the PS in the ministry responsible for juvenile justice and her staff, the concern was raised that the TCI has high rates of juvenile crime and that the age of criminal responsibility should not be too high. Nonetheless, the international trend is for a more liberal policy, decreasing the number of juveniles who can be caught in the net of criminal responsibility in the justice system. At the Working Group level, the Ministry proposed that the age of criminal responsibility should remain at ten and not go to the 12 and 13 age limits proposed in the Bill. This would mean that younger children could be tried for criminal offences and punished before the courts. There is still some debate as to what is an appropriate age of criminal responsibility in the Turks and Caicos.

For example, under the Convention on the Rights of the Child (CRC) Article 40(3)(a), States Parties are required to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), otherwise known as the Beijing Rules, recommends that the beginning of the age of criminal responsibility should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

The provisions in the OECS Model as reflected in the TCI Bill regarding the age of criminal capacity or responsibility, are also unclear. Under traditional legal principles

and, as endorsed under the UNICEF Convention, this usually refers to one threshold age below which (and including) a person will not be prosecuted because he or she believe to be bereft of the capacity to commit a criminal offence, i.e. know the difference between right or wrong with respect to criminality (including mens rea etc.). However, the Bill outlines two separate thresholds relating to criminal capacity and responsibility. On the one hand the Bill states simply that persons 12 years and under will not be prosecuted. Presumably, this is because such persons lack capacity, though this is not explicitly stated. However, further in the legislation, under s. 12 (9) there is a requirement that the system takes note of the offences that such persons have allegedly committed, which implies some notion of responsibility, and indeed breaches international standards. The police officer is mandated to inform a probation officer of the particulars of the juvenile who is under the age of 12 years.

Another problem that may arise is one of interpretation. Since the Board proceedings are not viewed as 'prosecution', it leaves room to argue that even children below the age of 12 years can come before the Board, which is surely not the intention.

In addition, the Bill provides that persons between 12 and 14 years are presumed not to have criminal capacity and a test must be done to determine whether they do or not. While the provision appears to be laudable by in effect, lessening the boundaries of juveniles who can be caught in the law, it is a somewhat confusing and burdensome way of achieving the goal. Further, it is unlikely that any body or court will determine that a 13 or 14 year old is incapable of understanding right from wrong in relation to criminal offences?

It is questionable whether this legislative formula can legitimately be called a threshold for criminal responsibility? The Convention requires that this be a fixed age and not a discretionary exercise. It also raises the question that the true age is 12 -the threshold age fixed and not between 12 and 14.

### **Special Facilities**

A number of special facilities are envisaged for children, including facilities for particular categories of children. For example, given the high migrant population, it is suggested that language services, which is viewed as a right under the CRC, is even more of an imperative.

Similarly, juveniles and young persons should have ready access to Legal Representation. As such, provision should be made for legal aid.

### **Family, including Maintenance and Domestic Violence Protection**

Jurisprudential concepts relating to family issues, in particular, those involving the maintenance of children and protection against domestic violence have undergone significant change in recent years. For example, such concepts have now seen the introduction of more gender centered notions of justice and treatment. Other examples include more contemporary notions of family, such as the acceptance of common law spouses.

Accordingly, the existing laws in this area need to be adjusted to keep pace with the more informed thinking on these subjects. Further, there is need for a more rational and effective approach to such issues.

The EU Legislative Review and Reform project will attempt to follow well developed OECS legislative models in the formulation of improved laws on the family.

The new laws on the family will serve as a final point for the ongoing Family Law and Domestic Violence Law Reform project.

### **Environment, including Public Health, Agriculture and Aquaculture**

A number of disparate issues need to be addressed under the heading 'Environment', including public health, occupational safety and health (both of which overlap with other areas targeted for reform), national parks and public spaces, agriculture (animal health) and environmental management. Areas targeted for reform include the creation of an Environmental Protection Agency. From dialogue with officials from Environment, this subject should also encompass the protection of endangered species and fisheries.

#### ***National Parks***

It is recognised that the Turks and Caicos is a small island jurisdiction with limited green and heritage public areas. As such, the Government intends to maintain the integrity of designated spaces of special recreational, cultural and historical significance for the enjoyment of its residents, including green areas and marine parks where appropriate. Accordingly, one aspect of the slated review on the environment is the

regulation of national public parks and spaces, including national heritage spaces and areas which needed to be preserved on environmental grounds for the benefit of the public at large.

In keeping with this objective, it is proposed that the current legislation on national and public parks be expanded to include protected areas generally, and to provide for the granting of concessions in those areas, as requested by the Director of the DECR. The Team Leader has pointed out that the proposal to legislate for community parks might have to be separate from legislation on national parks, as the latter fits into a pattern of regional and international obligations relating to preservation of species, green environments etc., while community parks are more just for local convenience. The Director of the DECR is currently revising the list of proposed amendments to the National Parks legislation and the Team is awaiting his instructions in that regard.

### **Environmental health**

The Working Group noted a paper on environmental health legislation which suggested that the apparent overlaps in the law between environmental health and environmental issues generally can be resolved by operational agreements between the Department of Health and the DECR. The Working Group noted a number of proposals for amendments to the Public & Environmental Health Ordinance (Cap.66) and various other laws made by the Chief Environmental Health Officer and agreed that work on those amendments should proceed.

It also noted a proposal for regulations to be developed to control liquid and solid waste and gas and smoke emissions and agreed that these could proceed if the resources of the EU Team permit.

### ***Food safety***

One of the topics which requires a decision on allocation of responsibility is food safety. Part VII of the PEHO relates to slaughterhouses and meat and food standards, but it is very out of date in terms of international and regional food safety standards generally. The Department of Health has in the past had responsibility for this topic and the CEHO performs enforcement functions. However, the Director of Agriculture and Chief Veterinary Officer suggest that food safety should come under the Department of Agriculture rather than the Department of Health. It is arguable that technical standards and compliance with the IHRs etc. are more appropriate for agriculture than health. It should also be noted that the Animal Health Bill, Control of Animals Bill and

Animals (National & International Movement and Disease Prevention) Bill should all come under the Department of Agriculture.

The Team has been given (by the Principal Legislative Drafter) some CARICOM model legislation on food safety and will be producing produce local versions of the legislation, with a view to a formal policy decision being made by the Advisory Council as to where the responsibility for it should lie.

### *Environmental and Public Health*

Inspection powers and enforcement mechanisms for environmental health officers are also viewed as necessary for an efficient public health legislative agenda. A regime similar to that which obtains for the labour inspectorate may be satisfactory. Consideration is to be given to a Public and Environment Health Ordinance.

### *Cemeteries and the Treatment of Human Remains*

Environmental and Public health concerns also encompass the lack of a modern, efficient legislative structure to regulate cemeteries and the disposal of human remains. For example, the cemetery legislation currently recognizes only Grand Turk as a lawful burial ground (including private cemeteries).

Further, the need has been identified to develop Regulations to govern morticians, funeral directors and mortuaries, including the treatment and transfer of human remains in general, including body parts. This would include the question of the repatriation of Human Remains of TCI citizens. A system of certification of disease free bodies is desirable, which would necessitate the law giving guidelines as to the process. Such certification regimes exist elsewhere, for example, in the UK/ Scotland.

A collateral issue raised by officials from the Immigration/ Registry department relates to the need to develop provisions for the registration of such repatriated dead persons. It is suggested that where a certificate is mandated for the transport of such remains from abroad, as discussed above, it can include a requirement that a copy of such certificate be deposited in the Registry. This would avoid the need of separate legislation.

### *Solid Waste Management*

The creation of a regulatory regime for the management of Solid Waste was noted by the AG's office. This issue was raised by the officials from Health and not environment. Such legislation may be best placed under Health, as above. It is noted that there is a draft on this subject, but that the draft lacks provisions for an appropriate regulatory authority. However, the said draft has not yet been forwarded to the Technical Team and be only of incidental importance to the legislative project.

Further, an appropriate regime needs to be established for litter control, since currently it is addressed under the Summary Offences Ordinance, which is inadequate. The view was expressed by the medical professionals that this subject should also be removed from Public and Environmental Health legislation. However, a policy decision needs to be made as to where such legislative provisions should be housed.

An improved regime should ensure that penalties and fines for littering can be efficiently addressed, moving away from actions in tort, such as nuisance, which must be pursued through lengthy court procedures. A possible formulation for such fines might be by way of a ticketing offence system. It is to be noted that to avoid constitutional limitations, such fines must be specifically stipulated in the relevant legislation and no discretion must be reserved to the ticketing officer. A suggestion was made that these be criminal offences, but this is strongly discouraged.

### *Administrative framework*

It is suggested that the administrative and institutional framework for environment also needs to be rationalized, defining more concisely the roles and functions of various officers, including with respect to enforcement. The overlap with health has already been noted above.

The relationship between the Environment and Planning Departments also need to be addressed, with their respective roles and functions defined. Similarly, the view is expressed that the National Trust competes with the Environmental Commission and this should be rationalized.

### **Public Service**

The provisions of the Public Service Commission Ordinance, the Public Service Regulations and the General Orders need to be modernized and streamlined. A particular concern is the weak managerial structures enshrined in the existing

legislation making it difficult for supervision and accountability. There is also a recognition that amendments need to be effected so as to provide for more effective disciplinary measures separate and apart from the judicial process.

Notwithstanding, policy directives in relation to the public service are still in transition. Previous work by the Team in this area revolved around previous Reports done on the sector. However, the Attorney General has advised that a new policy directive for the management of the public service is in train. Accordingly, the EU Legislative Project Technical Team will need to await more definitive guidelines before proceeding further on this subject.

### **Amendments to the Stamp Duty Ordinance**

The EU legislative reform project has been asked to make a few small, but significant amendments to the Stamp Duty Ordinance and Schedule 1 to enhance the Government's revenue base. As is known, stamp duties payable on conveyance on sale of immovable property were increased in 2010 by introducing higher property value thresholds and tiered rates. The 2010 amendments included a periodic payment scheme, which gives purchasers the option to pay their stamp duty in full on registration (with a 10% discount) or to pay their tax liability in four equal installments within a year of registration.

The first of the amendments to the Ordinance flows from the new Fractional Properties Bill described elsewhere in this Paper. This amendment would ensure that stamp duty is paid on the conveyance on sale of fractional properties. The second amendment provides for a small increase in the stamp duty payable on high value securities such as mortgages, debentures, bills of sale, bonds or covenants or on security given for the repayment of large sums of money lent or due. Although the rate of stamp duty for execution of most of these security instruments is quite low, there is currently a \$50,000 cap on the total duty payable. In the current economic situation, we see no reason to retain this cap. The second amendment would remove it.

Finally, Head 4 of Schedule 1 (Conveyance on Sale of immovable property ) will be amended to ensure that where there is a discrepancy between the consideration paid for a property and its market value, stamp duty is payable on the higher of the two.



## Amendments to the Land Holding Companies (Transfer Duty) Ordinance

The Land Holding Companies (Transfer Duty) Ordinance is targeted for amendment under the EU Legislative Reform Project in order to give effect to a decision of the Advisory Council made in March of this year, which concerns review earning capacity. That decision requires the Ordinance to be amended for the following purposes:

- to align the rates of transfer duty under the Ordinance with those assessed under the Stamp duty Ordinance;
- to mirror other relevant provisions of the Stamp Duty Ordinance (e.g. powers for the waiver, deferral, reduction or omission of duty in exceptional circumstances; exemption from duty on transfers to the Crown or to a charitable organisation);
- to ensure that duty is payable on the transfer of fractional interests in land via equity; and
- to exempt companies from paying duty on new issues of equity issued in land holding companies for the purpose of external debt retirement or expansion of their capital base, where there is no transfer of the underlying immovable property by the issuing Company.

The taxable base for stamp duty and transfer duty are essentially the same – land and property held within land holding companies. The alignment of rates of duty (and other provisions of the 2 Ordinances) should reduce the complexity of the tax system and its administration. The revenue implications of the alignment are neutral to positive.

The revenue implications of reducing the cost of new equity to land holding companies seeking to raise capital for expansion or to refinance are minor. The removal of duty in these cases will send a strong and positive signal about the Government’s resolve to remove unnecessary burdens on private sector businesses and to stimulate growth.

### Immigration

It is to be noted that the Ministry of Border Control is undertaking a sector wide policy review, which will call for major changes in the legislative framework after the Technical Team has been advised of these policy changes. Notwithstanding, some issues have been aired in the dialogue with officials from that Ministry and the EU

Legislative Project Technical Team is awaiting final resolution of policy issues. Some important issues tabled for resolution are mentioned here:

### *Citizenship and Residence Status*

A key issue in border control / immigration is the rationalisation of residence and citizenship status in the TCI. This has important implications for several other areas of endeavour including entitlements relating to Labour, Health, Education and Trade. Whatever policy decision is decided upon will need to be efficiently formulated into appropriate legislative provisions.

It is apparent that these questions are also questions of constitutional law. As such the new constitution now offers guidance on the meanings of these important concepts. These new definitions will be incorporated into the Immigration Ordinance. At present, the Immigration Ordinance defines citizenship. However, this is not a satisfactory state of affairs and such definitions should be contained in the constitution.

The authority to confer resident status presently resides in the Minister and there is a view that such individual decisions from Minister are conducive to malpractice. The view was expressed that such an individual / office should not have absolute discretion. However, under administrative law, no discretion is absolute and the problem might be that the remedies of judicial review have not been sought to prevent such abuses. It is difficult to identify a method under which some person or persons will not have discretion, such discretion always being subject to abuse. What may be helpful would be to legislate for more potent procedural mechanisms, such as the giving of reasons in decision- making.

The policy decisions and relevant legislation relating to residency status and the requisite entitlements should also be broad enough to encompass marriages of convenience; adoption; the children of persons with work-permits and the holders of business licences.

### *Merging Customs and Immigration*

Under a recent merger of government's customs and immigration functions, a single entity has been created- the newly established Ministry of Border Control and Labour. The view has been expressed that there is now the potential to obtain an integrated and much more effective approach to border control, which would necessitate consolidated legislation and procedures. Currently, two separate statutes regulate the two functions of this ministry - the Customs Ordinance and an Immigration Ordinance. Customs and

immigration are customarily treated as separate under legislation, since they relate to separate functions and indeed, the former also has revenue collection capacities, which the latter does not. This is a matter which should be discussed further, since no particular drafting or policy instructions have been identified to date.

## Education

A number of issues relating to education and in particular, higher education in the TCI, remain to be addressed through legislative amendment. These relate both to the jurisdiction of the relevant law, the Universities and Colleges Ordinance and to the administrative framework established under the auspices of the current law.

It is noted that Education Regulations were previously drafted before the life of the EU legislative project and comments made to same, but that no consensus has been reached on these provisions.

The areas of reform include:

### *Expanding Jurisdiction to Regulate all Higher Education Institutions*

Currently, the Ordinance does not reach to certain higher education institutions which need to be regulated. For example, offshore institutions, such as the several offshore medical schools, do not come under its jurisdiction, with the result that there are no standards set for these institutions. Guidelines have been developed to address this lacuna and these would have to be reviewed and translated into law. Pertinent questions would be whether the standard should conform to the same standards set for TCI education institutions, given that the certificates of higher education being issued by these institutions would not issue from the TCI.

Some thought should be given to the possible need for persons from the investment authorities to liaise with the education authorities in applications for operation from these institutions and in setting the various standards, given that these institutions may be viewed more in the nature of investment opportunities as opposed to educational institutions which impact on the education of citizens and residents of the TCI. Similarly, a policy decision needs to be taken as to whether, in the case of medical offshore schools, the Health Authority would need to be involved in decisions concerning these institutions. It would appear that currently, such institutions are only vetted by TCI Invest?

### *Providing a More Coherent Regulatory Framework for Higher Education*

A general concern is that the roles and functions of the Higher Education Board need to be reviewed, clarified and defined clearly in legislation. While the intent in establishing the Higher Education Board may have been to have in existence a single authority that can oversee all matters relating to higher education in the jurisdiction, this is not currently the case. Anecdotal evidence suggests, for example, that presently, the Higher Education Board is only involved in scholarships, which may be contrary to the Ordinance.

Similarly, the Community College has its own Board, which is regulated by a separate Ordinance and does not appear to fall under the jurisdiction of the Higher Education Board. The question is raised whether these functions should be merged. These are policy questions which should be addressed.

### *Access to Education and Migration Policy*

The question of the access to an education also falls for review, particularly with respect to certain categories of students, in particular, pregnant students and non-belongers, both of which may well be viewed as discriminatory.

Currently, the law does not stipulate that a student cannot be expelled or otherwise excluded from school or other education benefits on the ground of pregnancy. This must be rectified to bring it in line with CARICOM and international standards and avoid gender discrimination, given that such exclusions impact disproportionately on females.

While not specifically mentioned in the discussions, given that one objective of the exercise is to review the juvenile justice system, care should also be taken to ensure that the law provides for the continuing education of children who come before that system, whether because they are convicted of offences, or because they are deemed to be 'in need of care and protection.'

On the question of migrant policy, as in other sectors, the issue of migrant status impacts importantly on the Education sector. There is a clear need to reconcile migrant policy with the education system. In many cases, the problem might be that whereas provision may be made for a parent to reside in the TCI under immigration law, no provisions are made for their children to be educated etc, even where they are accepted as legally resident. In general, the entitlements of non-belongers who are students are not clearly articulated, either in terms of policy or law. In some respects, the law

appears to unintentionally discriminate against persons who are non-belongers. For example, non-English speaking non-belonger students may be excluded from school since they can be barred on the grounds that they do not speak English as mandated under the Education Ordinance. This would constitute indirect discrimination under discrimination law. Notwithstanding, in anti-discrimination law, there is some leeway given on the basis of nationality.

A further question would relate to other benefits that such children could receive. For example, would a child who is not a believer be entitled to a scholarship, if he or she qualifies on the basis of merit? Would there be a set period for that child to have resided before he or she can qualify? These are some of the policy questions that need to be addressed.

The education policy should therefore include decisions as to the status of children of persons who are migrants, reside on the basis of a work-permit etc. If it is determined that such children can lawfully reside in the TCI during the period of residency of their parents, adequate provision for education should be made. This may include the need to institute language classes for non-English speakers. (In Cayman, children are not accepted).

It should be noted that children born in the TCI do not automatically acquire TCI believer status, and cannot legally be admitted into schools since they take the mother's status and must be endorsed on the work permit. Such children may run the risk of being 'stateless', or at least, being deprived of benefits both from the TCI and from the jurisdiction to which their parents belong.

Such questions should also be considered taking into account international law obligations in relation to statelessness, nationality etc.

### *Content of Curriculum and Penalties*

Questions have been raised as to the appropriate content of the curriculum under the Education Ordinance. For example, with respect to section 11 (g) Part 111 B, a policy decision should be made as to whether 'physical education' should be spelt out as a requirement. This is policy decision which can be effected easily into law.

Similarly, under section 17 (1) of the Ordinance, Bible Knowledge is specifically mentioned which raises the important question as to whether students should be compelled to receive religious education? This has the potential to raise constitutional/

human rights issues such as discrimination (indirect or direct) on the grounds of religion. Collateral issues would be whether a student has the right to demand religious instruction in the religion of his or her choice, or whether a student, or even a teacher / instructor has the right to wear religious attire. Such questions have occupied the courts of other jurisdictions, including those in the Commonwealth Caribbean and should be resolved by the Legislature.

The current law permits corporate punishment to be issued and needs to be rectified, both because it is now an outdated mode of punishment and because corporal punishment has been found to be in violation of the constitution as cruel and inhuman punishment by the courts in the region and elsewhere.

### *Constitutional Requirements*

The list of areas for review indicated that one subject concerns the ‘Reform of the Education Ordinance to take account of Constitutional and international obligations.’ The Technical Team has not been directed to any particular constitutional concerns and policy direction is awaited on this issue. In the interim, however, it should be noted that whilst economic and social rights, such as a right to an education are not securely protected under constitutions generally, or under international conventions, recent jurisprudence has found ways to make such rights justiciable. Accordingly, the issue raised above with respect to children who are lawfully resident in the TCI, but who are non-belongers and who are effectively denied an education or some educational opportunity, may find traction before the courts. Similarly, general non-discrimination protections may pertain to such situations.

The denial of an education to children on the grounds of pregnancy may also confront constitutional challenges, both on the ground of a general right to education and on the ground of gender discrimination.

As noted above, issues concerning discrimination on the ground of religion and relating to corporal punishment may also raise constitutional challenges.

### *VAT Exemptions for Educational Establishments*

Under the new VAT regime being instituted in the Turks and Caicos, special exemptions will be given to educational establishments. These will be narrow exemptions. Current thinking is that such exemptions will be housed in the VAT legislation and not in the Education Ordinance.

### **Oversight to Implementation of VAT Regime**

The Government of the Turks and Caicos has embarked on a financial initiative to implement a value added tax system to replace the current fiscal system. It is envisaged that the VAT will be a much more efficient system of taxation. The EU Legislative Project did not draft the requisite legislation to implement the VAT, but was a part of the review process in the implementation exercise. It therefore carried out in-depth reviews of the drafts presented and made several comments for revision.

### **Posts and Communications**

The main objective of the law reform exercise in this area is the modernisation of the laws relating to Post Office and the Philatelic Bureau to enable better service delivery and revenue general potential. This will require minor amendments to existing legislation.

### **Consistency with the New Constitution**

It is agreed that all amended and new legislation will need to be in line with the Constitution that is currently being revised. The EU Legislative Project Technical Team has been cognisant of a 2011 Constitution Order which has been the model used in the law reform preparatory process.

### **Reliance on Revised Laws 2011**

The EU Legislative Project Technical Team has also taken into account a law revision process (updating the language and form of existing legislation) which was completed in 2011. All Draft Bills prepared by the EU Legislative Project Technical Team have been formulated using these new revised laws as their basis.

## APPENDIX 1 - LIST OF PROPOSED NEW LEGISLATION AND AMENDED LEGISLATION

1. Crown Lands Ordinance\*\*
2. Health Regulation and Health Professions Ordinance\*\*
3. Integrity Commissions Ordinance
4. Trafficking in Persons (Prevention of) Ordinance\*\*
5. Fractional Ownership Ordinance\*\*
6. Landholding Companies (Transfer Duty) (Amendment) Ordinance
7. Registration of Land (Amendment) Ordinance
8. Employment Ordinance 2012\*\* (to repeal existing Ordinance)
9. Confidential Preservation of Relationships (Amendment) Ordinance
10. Stamp Duty (Amendment) Ordinance
11. Tax Exchange of Information (Amendment) Ordinance
12. Value Added Tax Ordinance\*\*
13. Immigration (Amendment) Ordinance
14. Public Service Orders and Regulations
15. Companies (Amendment) (Non Profit Companies) Ordinance
16. Securities Exchange Ordinance
17. Trusts (Amendment) Ordinance
18. Companies (Amendment) Ordinance.
19. Juveniles Ordinance ( to be repealed)
20. Proceeds of Crime (Amendment) Ordinance
21. Occupational Safety and Health Ordinance\*\*
22. Juvenile Justice Ordinance\*\*
23. Enforceability of Collective Agreements Ordinance \*\*
24. Education (Amendment) Ordinance
25. Universities and Colleges (Amendment) Ordinance.
26. Education Regulations
27. Higher Education Board Ordinance
28. Trade Union (Amendment) Ordinance
29. Health Practitioners Ordinance ( to be repealed)
30. Family Law Ordinance \*\*
31. Child Care and Protection Ordinance \*\*
32. Domestic Violence Ordinance\*\*
33. National Parks Ordinance (to be repealed)



34. National Parks and Protected Areas Ordinance\*\*.
35. Fisheries Protection Regulations
36. Physical Planning (Amendment) Ordinance
37. Coastal Protection (Amendment) Ordinance
38. Public and Environmental Health (Amendment) Ordinance
39. Order for the protection of mangroves and other key plant species\*\*
40. Endangered Species (Collection, Transport and Trade) Ordinance\*\*
41. Wildlife and Biodiversity Protection Ordinance\*\*.
42. Environmental Management Ordinance
43. Wildlife and Biodiversity Protection Ordinance\*\*
44. Pesticides and Toxic Chemicals Control Ordinance
45. Animal Health and Movements Ordinance
46. Control of Animals Ordinance (to be repealed)
47. Food Safety Ordinance
48. Non Profit Organisations Regulations\*\*

\*\* Ordinances on new subject matter

## APPENDIX 2 - APPROXIMATE LIST OF ADDITIONAL LEGISLATION CONSULTED AND RELATED AREAS

### A. Existing Legislation

1. Banking Ordinance
2. Insurance Ordinance
3. Financial Institutions
4. Business Licences
5. Water and Sewerage Ordinance
6. Physical Planning Ordinance
7. Minerals (Exploration and Exploitation) Ordinance
8. National Park Ordinance
9. National Trust Ordinance
10. Protection of Historic Wrecks Ordinance
11. Plant Protection Ordinance
12. Wild Birds Protection Ordinance
13. Coastal Protection Ordinance
14. Fisheries Protection Ordinance
15. Fisheries Limits Ordinance
16. Draft Whaling Ordinance 2007
17. Draft Marine Pollution Ordinance 2007
18. Draft National Parks (Amendment) Ordinance 2007
19. Draft National Parks and Protected Areas Regulations
20. Draft Wildlife and Biodiversity Ordinance 2007
21. Draft Wild Flora and Fauna (Collection, Transport and Trade) Bill
22. Environmental Management Bill
23. Data Protection Ordinance
24. Investment Dealers and Mutual Funds
25. Control of Drugs Ordinance
26. Public Health Ordinance
27. National Health Service Board
28. International Health Regulations 2005
29. Notification of Diseases
30. Quarantine Regulations (see also Ports)
31. Solid Waste Management
32. Summary Offences

33. Repatriation of Human Remains
34. Food Hygiene Regulations
35. Environmental Protection Agency
36. Marine Ordinance
37. National Trust Ordinance
38. Customs Ordinance
39. Cemeteries
40. Constitution of the Turks and Caicos
41. Civil Aviation Authority
42. Child Care and Adoption
43. Juveniles Ordinance
44. Juvenile Offenders Ordinance
45. Police Ordinance
46. Criminal Procedure Act
47. Status of Children Ordinance
48. Water Authority
49. Partnerships Ordinance
50. Post Office Ordinance

**B. Existing Bills Relevant to the Project**

1. Domestic Violence Bill
2. Environmental Management Bill 2010
3. Environmental Management (Affluent) Regulations 2010
4. Endangered Species Bill
5. Juvenile Justice Bill
6. Matrimonial Causes Bill
7. Occupational Health and Safety Bill 2010
8. Ports Authority (Amendment) Bill 2010
9. Road Traffic (Amendment) Bill 2010
10. Litter Regulations
12. Port Health Bill
13. Review of Food Safety Bill
14. Solid Waste Management Bill
15. Draft Education Regulations
16. Fractional Ownership Bill
17. Endangered Species (Collection, Transport and Trade) Bill
18. Wildlife and Biodiversity Protection Bill
19. Environmental Management Bill
20. Wildlife and Biodiversity Protection Bill

21. National Parks and Protected Areas Bill
22. Health Practitioners Bill

## APPENDIX 3 - LIST OF EXPERTS

### Professor Rose-Marie Belle Antoine – Team Leader and Key Expert 1

Professor Antoine was appointed lecturer in law at the University of the West Indies (UWI) in 1992 and senior lecturer in 1998. In 2004 she was promoted to the rank of Professor, holding a double Chair as Professor of Labour Law and Offshore Financial Law. She is also a Partner in *Anthony & Antoine*. Antoine was elected as Commissioner to the Inter-American Commission on Human Rights, Washington in 2011. Previously, she worked in London and at the ILO in Geneva. Professor Antoine is a former Director of the Master of Laws programme and Deputy-Dean at the UWI. Antoine is an Oxford Commonwealth Scholar (1994) and the Cambridge Pegasus Scholar (1988). She holds a doctorate from Oxford, an LLM from Cambridge, an LLB from the UWI and diplomas in international human rights from the International Institute of Human Rights in Strasbourg. She is also an adjunct professor at the DePaul, Illinois and Case-Western universities, USA and was the Senior Leo Goodwin Fellow at Nova Southeastern University, Florida.

Professor Antoine is a prize winning author and includes among her awards, the coveted Vice-Chancellor's Regional Award for Excellence in Research and the UK Emerald Literati Prize for the best published work. She was also honoured by the Commonwealth Foundation UK as an eminent scholar and named as an outstanding 60 under 60 UWI Academic. She is the author of eight books, two of which, *Confidentiality in Offshore Finance* and *Trusts and Tax Issues in Offshore Financial Law*, published by Oxford University Press, were described as 'path-breaking' by international jurists. She also authored the well-known *Commonwealth Caribbean Law and Legal Systems*, (Routledge, London), *Legal Issues in Offshore Finance*, *Harmonisation of Labour Law*, co-authored the *Unfair Dismissal Digest*, ILO and published numerous articles in scholarly journals.

Professor Antoine has served as lead legal consultant to virtually all Caribbean governments, the UK, US, Venezuela, Canada and to several international

organizations, including the EU, OAS, IADB, World Bank, CARICOM, OECS, PANCAP, UNICEF, ILO, UNIFEM, Commonwealth Secretariat and UNDCP. Consequently, she has produced influential and far-reaching policy documents and drafted legislation on various diverse subjects, including on Financial Law, Public Service, Non-Discrimination, HIV, Juveniles, Public Law, Prisons, Police Service, Health, Mutual Legal Assistance, Labour, Free Movement, Gender, Immigration, Human Rights, Judicial Training and Anti-Corruption. Antoine is Chair of the PANCAP Regional Group of Experts on HIV and Migration and a legal resource person on HIV for several organizations and governments.

### **John F. Wilson - Key Expert 2**

Mr. Wilson has an MA in law from Oxford University in England and was called to the Bar by the Inner Temple in 1966. He practised as a Barrister in England for 10 years, then went to the Solomon Islands as Crown Counsel in 1976. In 1977 he became Attorney General of Tuvalu, and helped to steer the country to independence.

From 1979 to 1983 Mr. Wilson was Attorney General of Montserrat. He then went to the law drafting division of the AGs Chambers in Hong Kong, where he remained for 13 years. He dealt with legislative issues arising out of the transfer of sovereignty to China in 1997, including the implementing of treaties, the localisation of English laws and the adaptation of laws to the Basic Law of the Hong Kong Special Administrative Region.

In 1997 Mr Wilson returned to Tuvalu to advise on constitutional issues and in 1998 went to Fiji as First Parliamentary Counsel (chief law drafter.) He was responsible for drafting laws to implement the 1997 Constitution and for training local law drafters.

From 2000 to 2002 Mr Wilson was in Grenada as legal draftsman. He also advised Parliament and the Governor-General on constitutional issues. In 2002 Mr Wilson returned to Hong Kong for a further 2 years with the drafting division. He drafted several complex Bills and supervised the work of junior drafters.

Since September 2004 Mr Wilson has been based in England as a law drafting consultant. He has travelled extensively in the Pacific, visiting all the English-speaking territories on law drafting assignments. In 2008 he was asked by the Gibraltar Government to draft a complete criminal code, covering offences and procedure, which was recently enacted. He has done similar work for St Helena, and continues to do law drafting work for that territory.

In March 2011 Mr Wilson was engaged by the TCIG to do some criminal law drafting work and he subsequently did HIV/AIDS drafting work for other Caribbean Overseas territories on a DFID consultancy. He took up the post as Key Expert 2 in the EU project in July.

### **Don Macpherson - Short Term Consultant**

Don Macpherson spent most of his career working for the Canadian Justice Department, and has 20 years experience drafting legislation for the Canadian Parliament. He also drafted legislation in St. Lucia in 2004 and in Bermuda from 2005 to 2010, where he was named Bermuda's Chief Parliamentary Counsel in 2006.

In 2010 Macpherson wrote Law Revision Manuals for use by the staff and consultants engaged by the Law Revision Centre in revising the laws of the Turks and Caicos Islands, Montserrat and Anguilla and was the principal consultant for the 2010 Revised Edition of the Laws of Anguilla.

Macpherson is also a part time member of the faculty of Athabaska University, where he tutors students enrolled in the Graduate Program in Legislative Drafting.

### **Justice Dennis Morrison - Short Term Consultant**

Dennis Morrison was educated at high school in Jamaica, the University of the West Indies, Mona and Cave Hill and Oxford University (Jamaica Rhodes Scholar 1975). He was a member of the first graduating class in the University of the West Indies LL.B. programme in 1973 (with First Class Honours) and of the Council of Legal Education Legal Education Certificate programme at the Norman Manley Law School in 1975 (Legal Education Certificate of Merit).

A member of the Council of Legal Education since 1987, he was elected Chairman of Council in 1998, serving in that capacity until early 2005.

Called to the Jamaican Bar in October 1975, he practised as an advocate before the courts of Jamaica (as a member of the Kingston firm of DunnCox, from 1982 - 2008), The Cayman Islands, The Bahamas, Antigua and Anguilla and was appointed Queen's Counsel in 1994. He has served as an arbitrator in respect of a number of commercial and construction disputes from time to time. In 2004, he was counsel to a Commission of Inquiry established by the Government of The Bahamas to investigate allegations of misconduct by members of The Bahamas Defence Force and in 2007 was a member of

the tribunal established by the President of Trinidad & Tobago to consider the question of the removal from office of the then Chief Justice.

He was the Jamaican Bar Association President, 1995 – 1999 and the Organisation of Commonwealth Caribbean Bar Associations (Secretary, 1985 – 1993). Morrison is also an Associate Tutor at the Norman Manley Law School, was an Adjunct Lecturer in the LL.M. programme in Corporate and Commercial Law of the Faculty of Law, University of the West Indies (2003 – 2005) and a Leo Goodwin Fellow at Nova Southeastern University, Fort Lauderdale, in 2004. He has authored numerous articles and seminar papers and has delivered public lectures on a variety of legal subjects.

He has also been a member of and chaired a number of boards in the private, public and voluntary sectors, including the Jamaica Council for Human Rights, the Kingston Legal Aid Clinic, the Legal Aid Council of Jamaica, the Council of Voluntary Social Services, the Kingston YMCA, the Bank of Jamaica, the Securities Commission of Jamaica, RBTT Bank Jamaica Ltd, Life of Jamaica Ltd, and others.

In June 2004, he was appointed a judge of the Court of Appeal of Belize, a position in which he continues to serve, and in 2008 he retired from private practice to take up an appointment as a judge of the Court of Appeal of Jamaica.

He is married (to Janet Elaine, an attorney-at-law), with four adult children.

### **Christine Toppin-Allahar - Short Term Consultant**

Christine Toppin-Allahar is an attorney-at-Law, specialising in environmental, planning and land law, with qualifications and experience in legislative drafting. She is a lawyer, who in addition, holds a degree in Geography and Economics, with postgraduate qualifications in Geography and Planning and a Certificate in Integrated Surveys for Natural Resources Development. She has over 35 years experience in the field of planning and environmental management in the public and private sectors, and over 20 years experience as a practicing attorney and international consultant on environmental, planning and land law, policy and institutional arrangements.

In the field of planning, she spent ten years in the public service, with the Town & Country Planning Division of the Ministry of Planning and Development in Trinidad & Tobago, and with the Ministry of Housing, Lands and the Environment in Barbados. In the private sector she has worked in Trinidad & Tobago with Trintoplan Consultants Ltd., Alpha Engineering and Design Ltd., and Rapid Environmental

Assessments Ltd. She is a professional member of the Trinidad & Tobago Society of Planners (TTSP) and an affiliate member of the Association of Professional Engineers of Trinidad & Tobago (APETT). As a lawyer, Christine has worked in the Attorney General's Department, Trinidad and Tobago, and in private practice. She is a member of the IUCN Commission on Environmental Law and has served as a consultant on planning, environmental management, institutional strengthening and legislative drafting to various international organizations, including the World Bank, IADB, CDB, UNDP, UNCHS, UNECLAC, PAHO/WHO, FAO, OAS, DFID and the EU and has worked in every Commonwealth Caribbean country, several non-English speaking countries in the region, as well as outside of the Caribbean. She has also engaged in voluntary work as a member of various environmental NGOs. In this capacity she has served as an executive member of Caribbean Conservation Association (CCA), and is an Honorary Life Member of the Board of Directors of the Asa Wright Nature Centre (AWNC) in Trinidad & Tobago.

She has participated in many international seminars and conferences on planning and environmental law and has several published works on planning, environmental and land law. During the academic year 2010-2011 she served as Course Coordinator and Lecturer in International and Caribbean Environmental Law at the Faculty of Law, UWI Cave Hill Campus, Barbados. Previously, she served for several years as a part-time lecturer in planning, land and environmental law in the post-graduate programmes in Planning & Development, Land Administration and Environmental Engineering in the Faculty of Engineering at the University of the West Indies, St. Augustine Campus, and also lectured in Environmental Law and Policy in the Masters Programme in Environmental Science & Management at the University of Trinidad & Tobago. She has also served as an External Examiner for the Masters Programme in Legislative Drafting at the University of the West Indies, Cave Hill Campus and a guest lecturer for McGill University and Santa Clara University.

## APPENDIX 4 - LIST OF MEMBERS OF CONSULTATIVE WORKING GROUP AND PRIVATE SECTOR PARTICIPATION

### A. Members of the Working Group

**Chair** & Territorial Authorising Officer of the Project - Delton Jones, Permanent Secretary, Ministry of Finance



Hon. Attorney-General – Huw Shephard  
Deputy Attorney-General – Rhondalee Braithwaithe Knowles  
Chief Parliamentary Secretary – Desiree Downes  
Permanent Secretary, Immigration & Labour – Clara Gardiner  
Permanent Secretary, Environment – Mary Harvey  
Permanent Secretary, Social Services – Denise Saunders  
Permanent Secretary, Health & Human Services – Judith Campbell  
Kenisha Bacchus -Head of Mutual Funds, Investment Dealers & Company Management  
Dept and Head of FSC's Grand Turk Office, Financial Services Commission  
Wesley Clerveaux - Director, Department of Environment and Coastal Resources  
Eugene Otunyue – Director, Integrity Commission  
Kingsley Been  
Andy Gale – Registrar of Lands (Ag)  
Desmond Wilson  
Charlene Higgs  
Barbara Higgs  
Nigel Hearnden  
Leroy Charles  
Cheryl Ann Jones  
Dr. Nadia Astwood – Acting Director of Health Services, Ministry of Health and  
Human Services  
Dr Rufus Ewing, Director of Health Services, Ministry of Health and Human Services  
Nicky Turner – (Agriculture)  
Kendal Morgan  
Shaban Hoza  
Claudia R. Coalbrooke -Senior Compliance Officer, Dept. of Investment Dealers, Mutual  
Funds & Company Management, TCI Financial Services Commission  
Art Forbes – President of the Labour Tribunal.  
Jon Llewelyn, Advisor, Crown Lands  
S. Taylor

#### **B. Private Sector Specialists On Technical Teams**

Owen Foley  
Emma Riach  
Lindsay McCann

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*Professor Rose-Marie Belle Antoine*

*Team Leader*

*EU Technical Support for Legislative Review in the Turks and Caicos*

*February 2012*