

Report

June 5, 2009

KINGDOM OF TONGA
Interim Report
From the Constitutional and Electoral Commission

The Constitutional and Electoral Commission Act, 2008, established the Constitutional and Electoral Commission (the Commission) and came into force on 23rd July 2008.

By this Act, the Commission is required to make interim and final reports and recommendations on constitutional and electoral reform to the Privy Council and the Legislative Assembly. By section 8(1), reports prepared by the Commission must be published unless the Commission for good reason decides otherwise.

Schedule 3 further requires that the interim report and any interim recommendations shall be delivered within 5 months of the date of appointment of the Commission. That appointment was made on the 5th day of January, 2009.

The members of the Commission appointed by the Privy Council are:

Honourable Justice Gordon Ward, Chairman, on the recommendation of Cabinet;
Honourable 'Alipate Tu'ivanuavou Vaea, on the recommendation of the Nobles' representatives of the Legislative Assembly;
Dr Sitiveni Halapua, on the recommendation of the People's representatives of the Legislative Assembly;
Dr 'Ana Maui Taufe'ulungaki, on the recommendation of the Judicial Services Commission; and
Sione Tu'itavake Fonua, on the recommendation of the Judicial Services Commission.

We therefore humbly submit our interim report to His Majesty in Council and to the Honourable Speaker of the Legislative Assembly and ask that it be published the following day.

Dated this fifth day of June 2009

Gordon Ward
'Alipate Tu'ivanuavou Vaea
Sitiveni Halapua
'Ana Maui Taufe'ulungaki
Sione Tu'itavake Fonua

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The Constitutional and Electoral Commission Act and the Commission's Duties

[1] The Constitutional and Electoral Commission Act creates the Commission and directs that it “shall examine, enquire into and report on” such matters as are specified in Schedule 2 of the Act. It is then required to report on and make recommendations on constitutional and electoral reform. The Act allows further matters to be referred to the Commission by the Privy Council or added by resolution of the Legislative Assembly. No such additions have been made and the Commission’s work has been contained within the terms of the Schedule.

SCHEDULE 2

SPECIFIC MATTERS OF ENQUIRY AND REPORT

The Executive

The roles, functions, powers, duties of, and relationships between the Monarch, the Privy Council, Prime Minister and Cabinet.

The size and composition of Cabinet.

Delegation of certain authority by the King to the Prime Minister.

The principle of collective responsibility of Cabinet.

The Legislature

The composition and method of selection of members of the Legislative Assembly.

The term of the Legislative Assembly.

Relationships between the Executive and the Legislature

The roles of the King, the Prime Minister and Cabinet, including accountability the measures.

King’s function in the law-making process.

The appointment of the Prime Minister from the Assembly.

The appointment of Ministers to Cabinet and the consequences.

The term of office of Cabinet Ministers.

Motions of “no confidence”.

The Electorate

The electoral system.

Definition of constituencies and distribution of seats.

[2] Section 4(2)(b) directs the Commission to take into account “all of the relevant considerations that are brought to its attention concerning constitutional and electoral reform in the Kingdom” but, by section 5(1), those relevant considerations must include

reports, proposals and matters considered by the National Committee for Political Reform and the Tripartite Committee, the views expressed in the press release from the Palace on 26 September 2006 and His Majesty's speech from the throne on 23 November 2006 together with any written submissions from His Majesty, Cabinet, the Legislative Assembly and any individual representatives in the Assembly and from groups of no less than 200 members of the public.

[3] The time frame allowed the Commission by the Act is surprisingly short for consultation, consideration and recommendation of such major and fundamental reforms to the structure of government of the country especially for a part time Commission. Within that time frame, we are mandated to report and make interim recommendations within five months and make the final report with draft legislation within ten months, namely by 5 November 2009.

[4] The members of the Commission are aware of the anxiety of the majority of the people of Tonga to have changes implemented in 2010 in time for elections the same year. We have and will continue to strive to keep within the timetable and it is in obedience to that requirement that we publish this interim report. However, for reasons we give below, we will not, at this stage, make any recommendations.

The Work of the Commission

The first stages

[5] The members of the Commission were appointed by the Privy Council on 5 January 2009 and, to ensure compliance with the statutory requirements of the Act, started the first Commission meeting that day.

[6] The meeting gave an opportunity to define our duties and decide how we would perform them, to discuss the principal requirements and areas of likely reform and to set and publicise a timetable. Written submissions were invited and a total of 27 helpful, and often detailed, submissions were received within the time allocated.

[7] In accordance with sections 4(2) (d) and 9(1), public forums were held in the districts as follows:

Vava'u – Five meetings from 28 to 31 March 2009.

Ha'apai – Four meetings from 1 to 3 April 2009

'Eua – One meeting on 2 April 2009

Tongatapu – Six meetings from 6 – 8 April 2009

Niuas - The visit to the Niuas had to be cancelled in April. The Commission has apologised to the people of Niuatoputapu and Niuafu'ou and it is hoped a visit will be possible before the end of June 2009. It is worthy of note, that the very first written submission the Commission received was from the Niuas. We will not complete our work until we have held a forum there.

[8] As the forums were conducted in Tongan, the Commission was represented by the four Tongan Commissioners. Minutes were taken and circulated to all Commissioners and, following the forums, the Commissioners also reported to the Chairman by teleconference.

[9] The forums were reasonably well attended and clearly provided an opportunity for individual members of the public to raise issues of concern and to voice their individual opinions. They remedied in part the problem caused by the restriction in section 5(1)(iv) on written submissions to groups of 200 or more and have given a clearer view of how local Tongans feel about change in the fields specified in Schedule 2 especially looked at in the context of traditional life in the village and family setting.

[10] They revealed some confusion in the minds of many participants over the precise role of the Commission in the light of the previous meetings and report of the National Committee for Political Reform. More than once, speakers asked why the Commission was seeking their views when they had already, and at greater length, addressed them to the National Committee. Similarly there was a failure often to recognise the limitations placed by the Act on the ambit of this Commission's work. In all districts apart from Tongatapu, repeated concern was expressed about the lack of effective local government and administration. In every district, there was repeated concern about the land issue and the fear of the consequences of any change in the present laws relating to it, especially the likelihood of alienation. In many cases this appeared to be a matter of more significance and concern than electoral and representational change or other changes to the Constitution. It is noteworthy that the concerns about land had been foreshadowed in some of the written submissions by groups of members of the public.

[11] The Commissioners had frequently to explain that all issues about land and public administration, local or national, were outside the statutory purview of this Commission but we note that they reflect a widespread and clearly articulated feeling that central government has failed to reach many communities and individuals. It was apparent that many ordinary Tongans have little interest in politics or the structure of government. This may arise partly from a lack of ability to affect change over many generations but comments in the outer districts suggest it also stems as much from the need to support themselves and their families and a perception that government, however formed, will simply continue to neglect their interests and devote most of its time, energy and resources to the central districts.

[12] Whilst it is not within the matters upon which we can make recommendations, it is an aspect of life in present day Tonga that we cannot ignore if our recommendations for reform are to have any practical significance beyond the limited circle of parties who have a direct interest in possible personal advantage which may flow from such change. It is undoubtedly something any new government should bear well in mind. To ignore it may rapidly dull the present appetite for change.

The content of the interim report

[13] The submissions and the views expressed at the forums have been of considerable assistance in helping us to crystallise the areas within Schedule 2 upon which we need to consider reform. Those areas form the basis of this interim report and the Commission does not, as has already been stated, intend to make any interim recommendations at this stage. Our reasons are threefold:

1. We would like to invite further written submissions from the public addressed particularly to the topics we set out in this report;
2. All the topics upon which we will make recommendations are closely and elaborately interlocked so that each recommendation will need to be evaluated against the others in a holistic assessment before it can finally be advanced; and
3. We do not consider it necessary or feasible to convene a constitutional convention.

[14] Section 4(2)(e) requires the Commission to “consider convening a constitutional convention” and, if it does, Schedule 3 requires it to do so within seven months of the appointment of the Commission i.e. no later than 5 August 2009. We do not consider that such a convention will assist us in our decision and time constraints also make it impractical.

[15] Our final recommendations will and must be made in a Tongan context. Had we held such a constitutional convention, the Tongans we would have been constrained to invite are those who have already had an opportunity to provide submissions or attend the forums or will be able to make submissions on this report. The most likely overseas input would be from foreign experts on specific aspects of the law or other technical provisions. The Act empowers the Commission specifically to commission “legal and other expert reports and advices” which will provide more direct assistance to us on the legislative and procedural effect and efficacy of our recommendations.

[16] The Commissioners are of the view that we will derive more information and assistance by seeking further submissions on this interim report and will accept any such submission from individuals or groups. The restricted time means that we must impose a closing date on receipt of any such submissions of 6 July 2009.

[17] In consequence, this interim report has been drafted more as a discussion paper in the hope that it will stimulate further informed submissions on any matter within Schedule 2 but particularly those covered in this report.

The Commission's approach

[18] Section 5(2) provides:

“The Commission is an independent body and is obliged to consider but not agree with or act upon any recommendations, opinions or advice that it receives.”

[19] We make it clear that the submissions, written or oral, which we have already received and any we receive in response to this report will not be treated as a vote on the basis of the number of times any particular suggestion is made. All views and suggestions we receive will be taken into account, whether of the majority or a minority, and may or may not form a basis for our recommendations.

[20] Those recommendations will reflect what the Commission considers is best for Tonga and the people of Tonga both now and into the 21st century. Inevitably much in the future will be affected by economic and political developments beyond our shores but the history and traditions of this country including the constitutional provisions given to the Tongan people by King Tupou I in 1875 and amended over the ensuing decades must be a defining ingredient in our deliberations.

[21] By seeking further submissions we hope to gain a clearer view of public attitudes and aspirations. They will be taken into account as an indication of the likelihood the people will acknowledge the necessity for and, we earnestly hope, wisdom of the changes we recommend. It is indisputable that, in order to gain such acceptance, we must constantly bear in mind the role and strength of such unique Tongan values as faka'apa'apa, feveitokai'aki, fefoaki'aki, fe'ofa'aki, lototoo and mamahi'ime'a and the possible effect any reform may have on them and on the almost unbroken stability and equilibrium Tonga has enjoyed under the present system of government prior to the difficult years of the present millennium.

[22] The dreadful events of November, 2006 shook the very foundations of the peace and stability of the fonua. His Majesty's use of his prerogative power restored law and order in the immediate aftermath but the lack of any repetition owes much to the enduring strength of those same Tongan values. They caused people to step back from confrontation and encouraged, instead, reflection and an opportunity to reassess the pressures for change which had led in the preceding year to the National Committee, the Tripartite Committee and, subsequently, to this Commission. Those pressures remain and cannot be ignored but we do not see them as a threat to the peace and stability of the fonua but as an opportunity to restore and develop it together with proper and sustainable relations between the King, his traditional chiefs and the people which form such an essential part.

[23] Many constitutional changes of the magnitude of those sought by much of the population are often the product of gradual evolutionary development. Time provides opportunities for reflection and widespread evaluation. The cumulative effect of events over the last few years has left an expectation of immediate change which allows neither the people of Tonga nor the Commission that luxury. Unfortunately, the delays in

passing the Act, the time restrictions imposed by the Act itself and the widespread public expectation of change in 2010 combine to magnify that effect. Additionally, whilst the acceptance of the established political system over the last century and a quarter has guaranteed stability and security, that same system has more recently been seen by many as a barrier to evolutionary change.

[24] We acknowledge that it is vital, if our recommendations are to be accepted and implemented, that the population as a whole, whether they agree with them or not, can accept that they will sit comfortably with the long accepted sense of liberty and security which arose over the years from the blend of the traditions and history of the Monarchy and the importance of the fonua as the fundamental and continuing foundation of Tongan life.

[25] All the following topics, upon which we invite further comment and submissions, fall within the categories specified in Schedule 2 of the Act. However, we have categorised them under different heads which we consider link them more conveniently but it cannot and does not avoid some topics overlapping into more than one category. They are not all the matters we will consider but only those upon which we would especially value further input from the people. We have endeavoured to set out the principal considerations for and against the various issues. They are put forward in the hope that they might assist and encourage further informed consideration by the members of the public.

[26] Except where we have expressly stated that we have reached a particular conclusion, any apparent preference for a particular aspect which may appear is unintentional and should not be taken as representing the views we hold at present or will hold in the future.

The Monarchy

[27] It must be acknowledged that the catalyst for the changes we are considering was the personal and graciously expressed wish of HM King George Tupou V to grant the majority voice in parliament to the people through the ballot box and to devolve more royal prerogatives to the Legislative Assembly. Any constitutional changes affecting the King's powers must be considered in relation to the institution of the Monarchy rather than to His Majesty, or any other, future King. We are conscious of the fact that, if they are read in a personal context, they may well appear disrespectful and critical. That would be unfortunate and incorrect. Viewed, however, as a way of altering the powers of the institution of the Monarchy, we trust they will be seen simply as a necessary and desirable corollary to any transfer of power to an elected representative Legislative Assembly.

[28] There has been no discernable wish to change His Majesty's role as Head of State and it is clearly essential that it is preserved. Any changes we recommend will relate to the King's involvement in and with the executive government of the country. It is no part

of the Commission's role to make any recommendations in respect to the King's status as Hau.

[29] Under the present system of government, the highest executive body is the King in Council or Privy Council. All government decisions are passed from Cabinet to the Privy Council consisting of the Prime Minister and Cabinet Ministers with the Governors of Vava'u and Ha'apai, presided over by the King. In the case of legislation passed by the Assembly, it is presented to the King for his sanction and signature before it can become law. Between the meetings of the Legislative Assembly, the Privy Council may pass ordinances which have the effect of acts of parliament but are subject to confirmation, amendment or rescission by the Assembly.

[30] The Commission will consider recommending that the Prime Minister be selected by the Assembly from the elected representatives and he will then choose his own Ministers. All will be appointed by the King but His Majesty has accepted as a binding precedent that he will accept the Prime Minister chosen by the Assembly and the ministers recommended to him by the Prime Minister.

[31] It is clear that the population as a whole regards the monarchy as a stabilising influence on the manner in which the country is governed and a safeguard against unconstitutional actions by the Government. Despite His Majesty's wish to give control to the people through the elected government, many would feel reassured if he were, at the very least, to retain some power to control any possible governmental excesses or disregard of the Constitution or where intervention is necessary because the Legislative Assembly is unable to function.

[32] Two ways in which this could be achieved would be to retain his discretion to dissolve the Legislative Assembly, for example, when there is insufficient support to identify a Prime Minister, and to withhold his assent to new laws passed by the Legislative Assembly if, for example, they are clearly unconstitutional.

[33] It is probable that, apart from those mentioned in the next section, changes to the King's prerogative powers will be minimal and should not impinge on his traditional and customary role as the unifying factor in Tongan life. The Monarchy is the symbol of sustainable peace and stability of the fonua and it is to be hoped that any changes to the King's executive power will be recognized as symbols of the people's wish to continue to develop peace and stability in Tonga as a Kingdom.

[33A] The Commission gratefully acknowledges that, shortly after this report was completed, His Majesty, in his speech opening the Legislative Assembly on 28 May 2009, referred to the work of this Commission and stated, "I believe that we should continue with the political reform that we have initiated and I wish that these reforms are premised on the Legislative Assembly nominating to me the Prime Minister who has been chosen from the Representatives of the House and the complete devolution of the Privy Council's executive authority to the Cabinet that is nominated to me by the Prime Minister from the representatives of the Legislative Assembly."

Privy Council

[34] His Majesty's resolve to give control of Government to the people through the Legislative Assembly means that Cabinet and the Government will, in future, be answerable to the Legislative Assembly. The Prime Minister will be selected by the Assembly from the Assembly. The Government of the day will be subject to the will of the people exercised through the ballot box. The highest level of executive government will be Cabinet which will also be answerable to the Legislative Assembly and ultimately, therefore, to the electorate.

[35] In those circumstances, the inevitable questions are whether there would be any role for the Privy Council in executive government and, if not, whether there would be a need for it in any other role?

[36] The first must inevitably be answered in the negative. Clause 30 of the Constitution established the separation of powers (into the Ministry (Executive), Legislature and Judiciary) upon which King Tupou I founded his vision of Government in the modern state. The executive was composed of "The King Privy Council and Cabinet (Ministry)".

[37] If Cabinet and the government are answerable to the Legislative Assembly and the highest level of executive government is Cabinet, the present role of Privy Council in the executive is lost. With it must go the power to pass ordinances or to be involved in any way with making of laws which will properly be the sole province of the Legislature.

[38] Many of the submissions suggest the most useful residual role for the Privy Council would be to continue to meet as an advisory body to the King. At present the King appoints the members of the Privy Council but that is circumscribed by clause 50(1) of the Constitution which additionally directs that it shall include the Cabinet and the Governors "and any others whom the King shall see fit to call to his Council". The Legislative Assembly, by clause 59 of the Constitution, includes any Privy Councillors who sit as nobles in addition to the nobles' representatives. However, in recent practice, the Privy Council has consisted solely of the King, the Cabinet and the two Governors.

[39] The King has and will always have the right to seek advice from whomsoever he pleases and the Privy Council could advise him either informally on an ad hoc basis or as a more formally appointed body. As a purely advisory body, it is possible that the Monarch would still include the Prime Minister and possibly some Cabinet Ministers but they would not, by their attendance, be subject to any control by the Monarch of their executive function.

[40] The Governors of Vava'u and Ha'apai are appointed by the King and sit in the Legislative Assembly as Privy Councilors. Their duties as Governors are largely administrative and do not sit easily with their participation in the Legislative Assembly. A particular comment was that the time spent attending the sittings of the House took

them away from their administrative duties in their districts for a substantial part of the year. In a parliament consisting entirely of elected members their continued inclusion will be inappropriate. Their possible continued membership of the Privy Council will properly be a matter for the King.

[41] If the Privy Council is to have a more formal role, that role will have to be carefully defined to avoid conflict with the power of the Executive, Legislature or Judiciary or with any independent body established by statute.

[42] It is appropriate that appointment to Privy Council should remain the King's prerogative. However, the Commission has received various suggestions as to the basis on which the members of the Privy Council should be selected and whether that should be on their ability (in terms of expertise and individual knowledge) to give sound advice or whether membership of the Council should principally be an honour for distinguished service. In either case, should there be any limitation or restriction in terms of, say, numbers, nationality, occupation or high achievement or should selection recognise and reflect the different districts of the Kingdom in the final composition of the Council?

[43] It has also been suggested that it would be a more practical suggestion to abolish the Privy Council totally. As has been pointed out, the King should be able to seek advice as he wishes. If he is to receive the best available advice, should he not choose his advisers for their experience in the particular field in which he then needs advice and not just because they are Privy Councillors? A skilled accountant, for example, will not become an expert on, say, medicine or education simply because of his position on the Council.

[44] The Constitution provides that the Privy Council is the final appeal court for the determination of hereditary estates and titles; clause 50(2). Whilst that clause states that the Privy Council shall rehear the case, the practice is that the Court of Appeal judges hear the appeal and pass their decision to the Privy Council in the form of a recommendation. The Council then adopts the decision. There seems to be little reason to change that procedure and no submission has been made to that effect.

Cabinet

[45] Any changes to the executive (which, with the removal of any role in executive government for the King and Privy Council, will consist of the Cabinet and government), and to the legislature will have an immediate and profound effect on all Tongan people in terms both of implementation and consequence.

Appointment of the Prime Minister

[46] As has been stated, the most fundamental reform of Cabinet we shall be considering is that the Prime Minister be chosen by the elected members, both nobles' and people's representatives, of the Legislative Assembly from amongst their number and will, in consequence, be the elected member with the greatest overall support in the

House. He will continue to be appointed by the Head of State but, in so doing, the King will act on the decision of the House. Once appointed, the Prime Minister will select his own Cabinet Ministers and they will also be appointed by the King acting, in this case, on the Prime Minister's advice.

[47] The removal from Privy Council of any executive governmental function would leave the Cabinet as the highest level of government and the method of selection of the Prime Minister and his Cabinet will mean, as has also been stated previously, that the Government will be accountable to the Assembly and the people. Accountability is a vital safeguard against malpractice and incompetence and a government guilty of any such conduct in future can be called to account by the electorate through the ballot box.

[48] Two principal questions remain. The first is whether there should be provision for appointment of some members of Cabinet from outside the elected members of the House and the second is whether the Cabinet should be bound by the rule of collective responsibility. They are so intimately linked that they need largely to be considered together.

Appointment of ministers from outside the Assembly

[49] The submission that some of the Cabinet Ministers may still be appointed from outside the Assembly appears to grow partly from an acknowledgment that, in a community as small as Tonga, the range of experience and expertise among the elected representatives might not provide a suitably able appointee to manage some of the more technical but vital portfolios. The inability of the peoples' representatives over many years to have an effective influence on government policy as a result of the numerical balance in the Assembly and the appointment and tenure of the Cabinet has discouraged many able people from considering it worthwhile to stand for election. This is likely to continue until and unless the new form of government has proved itself to be effective and so there may be a need to obtain their involvement by direct appointment. On the other hand, ministers in many countries take portfolios in disciplines of which they have no special skill or knowledge. Such a minister will rely for expert advice on an independent and non-political civil service and the success of many governments owes a very great deal to such a public service.

[50] Some portfolios are more demanding than others and some are always necessary. That has been recognised since 1875 when King Tupou I noted in the Constitution the specific need, at that time, for a Prime Minister and ministers of lands, police and of finance (in the person, then, of the Treasurer). Modern attitudes to, and awareness of, the needs of the ordinary members of the public require the addition of others such as education, health and women's and children's welfare whilst Tonga's inevitably increasing involvement with the outside world obliges the addition of such portfolios as foreign affairs, trade, economic development and tourism.

[51] To take two specific cases; the critical importance of finance makes it desirable to have a minister with considerable ability and experience in the overall field of finance,

both at home and abroad. In a parliament the size of the Legislative Assembly, there may be no elected member with such expertise. To be limited to the representatives in such a situation could have dire consequences for the effective government of the country. Similarly, the increasingly complex issues of national and international law and administration make it vital that Cabinet has its own legal adviser in the form of an Attorney General yet a suitably qualified and experienced lawyer may not have been elected.

[52] If this is to be remedied by allowing some ministers to be appointed from outside the House, the number should probably be small to ensure that the unelected members cannot effectively control Cabinet by their combined vote.

[53] Opinion about such appointments appears to be divided between those who welcome them, either as a continuation of the present power of the King to appoint ministers or as a sensible contingency for the King or the Prime Minister to minimise the effect of possibly limited resources in the House, and those who do not accept that the inclusion of such members is consistent with the aim of giving control of government to the people through their elected representatives. If the doctrine of collective responsibility is to be maintained in Cabinet, selection of these ministers must, for the reasons explained below, be by the Prime Minister.

[54] Practical problems may arise in a case where the Prime Minister is able to select all his Cabinet from the elected representatives. Should he still be able to select the same number of people from outside the Assembly? If he does not, that session of the Legislative Assembly will have that many less members than one in which he does. Should he, in such a situation, still be able to have the extra members appointed simply to sit as ordinary members of the Assembly? Similarly, if the Prime Minister decides to dismiss one of the unelected ministers and to replace him with an elected member, will the unelected person remain as a member of the Assembly for the rest of the life of that parliament?

[55] It should also be noted that, if Ministers are to be selected from outside, the person elected by the Assembly as Prime Minister will, immediately he is appointed, be able to increase his effective majority in the House by adding the votes of the unelected members.

Collective responsibility

[56] As has been said, the previous question needs to be considered in conjunction with the issue of collective responsibility. It is a convention in many countries with a democratically elected government that the Cabinet Ministers are collectively responsible for all decisions reached in Cabinet. It is a practical and sensible manner of insuring that the Prime Minister is able to govern without the discussions and challenges which frequently precede a Cabinet decision being made public. It means that even a minister who has argued against a crucial Cabinet decision must support the decision in public. If he cannot, he must resign his ministerial appointment. (The possible consequence of the resignation of a minister appointed from outside the House has been mentioned above.)

Clearly with an elected government, it is essential that the country sees a united Cabinet which is also bound by the critically important requirement of Cabinet confidentiality.

[57] Whilst there has been an appearance of collective responsibility by the Cabinet in Tonga in the past, it more probably arose from loyalty to the King who appointed them than from loyalty to Cabinet colleagues.

[58] Some may feel it is a desirable safety factor for the Monarch to retain the discretion to choose the ministers from outside the Assembly but if that is done, the Prime Minister may have to accept Ministers into his Cabinet who hold views opposed to his government's policy and it is an inevitable corollary to selection and appointment by the King that the Prime Minister will not be able to dismiss such Ministers. The problems this could cause in terms of collective responsibility in Cabinet effectively preclude selection by anyone other than the Prime Minister.

[59] It must also be noted that, should a Monarch wish to influence or change government policy, he would have a powerful means to do so particularly if the Ministers chosen by the King feel the requirement of confidentiality does not restrict reports to the King who appointed them.

[60] Such problems would be avoided if the Prime Minister is allowed to choose his ministers from outside parliament in the same way as he chooses those from the elected representatives and thus ensure he has a Cabinet which shares his aims and can be relied upon to support his policies.

Motions of No Confidence

[61] If the Government is answerable to the Legislative Assembly, there should be power to move a motion of no confidence in the Prime Minister. Should he lose that motion, he must resign. In many countries that is followed by the resignation of the government, dissolution of parliament and a new general election. Such extreme disruption and expense may be avoided if there is provision for the Assembly, following a successful motion of no confidence, to select another Prime Minister who would then select his own Cabinet. Only if no clear leader appears, would the King exercise his discretion to dissolve the Assembly and order a fresh election.

[62] Motions of no confidence take priority over other parliamentary business and it may be a sensible additional safeguard to restrict the number or timing of votes of no confidence. This could be by preventing any such motion being moved, for example, in the first year after the general election if the session is three years or by providing that, once a motion is moved unsuccessfully, there can be no others for a minimum period such as six months or during the remainder of that session. The need for some restriction may be seen in some neighbouring countries where repeated motions of no confidence have brought effective government to a virtual standstill.

Transparency

[63] In a democratically elected government answerable to parliament, the need for transparency is vital. It has been a common complaint that many previous governments have not seen a need to consult with, or to provide information to, the electorate prior to making important changes in policy or law. This was reflected in the almost invariable inability of the peoples' representatives, when challenging government policy, to obtain answers to their questions. The constitutional right to petition the King or the Legislative Assembly provides an alternative means of redress but there is no means whereby a response can be assured.

[64] A step towards remedying this would be to make it a requirement that a minister must answer all parliamentary questions within a stated time. Another would be to allow any representative to bring a private member's bill. At present, only the government is permitted to initiate legislation. There are sometimes matters of public importance or interest upon which the government is not willing or able to pass laws. A private members bill may allow the appropriate legislation to be debated.

The Legislature

[65] Schedule 2 limits the topics into which the Commission is to enquire and make recommendations in respect specifically of the Legislature but some of the topics listed under the other heads in this report will be seen also have a direct effect on the Legislature.

[66] His Majesty's wish to give control of government to the people requires important changes to the present composition of the Legislative Assembly. Much has been agreed by the Tripartite Committee and we acknowledge that is a very significant, but not necessarily binding, consideration.

The number of representatives

[67] The Tripartite Committee's suggestion that there should continue to be nine nobles' representatives has gained almost universal acceptance as has the suggestion that the number of people's representatives should be increased substantially although there is some disagreement about the numbers. What is clear is that the final figures should be sufficient to allow formation of a government whilst still leaving sufficient representatives to form an effective opposition. Whether or not political parties develop in the future, an articulate opposition is one of the most fundamental checks on governmental excess or possible maladministration.

[68] Whilst debate in recent parliaments has, too frequently, become strident and confrontational, an opposition does not need to conduct itself in that manner to be effective. Much can be achieved by maintaining Tongan respect and the importance of consensus. How the Legislative Assembly controls its own proceedings is not a matter for this Commission but we mention it to avoid any assumption by members of the public

that active opposition necessarily involves such behaviour and again to emphasise the importance of opposition as vital to the checks and balances of a democratic parliamentary system.

The length of Assembly sessions

[69] At present, the length of each session of the Legislative Assembly is three years. It has been suggested that should be increased to four or five. The principal argument in support of an increase is that many development projects a government may wish to introduce will take longer than three years to be completed. This is especially so if the project requires overseas aid.

[70] On the other hand, as the ultimate control of any government lies with the electorate through the ballot box, the longer the term, the less opportunity the public has to change a government in which it has lost confidence. Even if there is a change of government, it is likely that any partly completed project will be continued by the new government unless it sees it as inherently wrong.

The size of Cabinet

[71] There have been comments about the size and resultant cost of Cabinet. The number of, and need for, particular ministries is a matter the Prime Minister must be free to determine to enable him to govern as he wishes. However, to have too large a number could allow a Prime Minister to add ministries simply to retain a majority in the House. Clearly there should be a limit on the number of Cabinet Ministers but if there are to be Ministers appointed from outside the House, the total number must be sufficient to prevent the unelected members of Cabinet being able to outvote those appointed from the elected representatives. This has been dealt with more fully under the heading 'The Cabinet'.

Remuneration of representatives

[72] At present the representatives determine and fix their own remuneration. Past Assemblies have not distinguished themselves in the timing or sensitivity of such decisions. This has been a common feature in many countries and, as a result in some parliaments, the salaries and allowances of the representatives are fixed by an independent commission. Many parliamentarians welcome such an arrangement because it ensures a transparent determination and award of necessary and fair adjustments.

[73] A major challenge facing the first governments elected under the new system will be to show that the system works and that they can govern effectively and fairly within it. Public confidence cannot be assumed simply because there had been support for the introduction of the new system. The present system has been accepted for many years almost without challenge because it provided little opportunity within the House for effective challenge. One of the most fundamental differences the new system will bring is that effective challenge is an ever present possibility. It would be facile to assume the

changes which may follow the work of this Commission will be universally welcomed. Criticism there will be and the introduction of an independent salaries commission may be a practical step towards removing one possible source of challenge.

Effective representation

[74] It is not part of our duty to make recommendations on the manner in which the representatives perform their duties but we would draw attention to the repeated complaint that electors in the outer districts are ignored by their representatives once the election is over. In many cases, it was said that they were unlikely even to be seen in the districts they were elected to represent until the next election was imminent. That is a matter for the Legislative Assembly to correct by its own rules but it is a matter they would be foolish to ignore. By allowing more meaningful involvement by the public in the choice of their government and in the parliamentary process in general, the changes we recommend will inevitably give rise to expectations of a much higher level of genuine representation. The new Assembly will ignore that at its peril.

The Electoral System

[75] It is perhaps in this field that the expressed wishes of the people are most likely to have a direct impact on our deliberations. To impose an electoral system which the public finds either incomprehensible or impractical or both is likely to negate any benefit intended to flow from the reform.

[76] It has been the view of a clear majority of submissions that, once the number of representatives has been adjusted, the present system of election should be retained; that is block voting by districts and winning seats on a first past the post system. At the same time, many of those who advocate the first past the post system have indicated support for changing the block vote to single member constituencies. There is a substantial acceptance of the retention of nobles' representatives in the Legislative Assembly as was accepted by the Tripartite Committee but differences as to whether they should be elected by the nobles alone, as occurs at present, or elected by the people.

The present system – retention or reform?

[77] The advantage of the first past the post system is that the placing of votes is simple; counting is quick and the results clear. The major disadvantage is that it does not necessarily mean that the person elected is the choice of the majority of voters and, therefore, the number of wasted votes may be substantial. In a field of five candidates, it is possible, for example that the person elected may only have the vote of less than a quarter of the total votes cast. The votes cast for the unsuccessful candidates are therefore considered wasted votes. Various alternative systems have been devised in an attempt to produce a result that more accurately reflects the choice of the electorate and minimizes the wasted votes. All are more complicated for the voter and delay the determination of the result. Most are effective principally where voting is largely based on political parties and none totally solves the problem.

[78] One of the simplest is the alternative vote. In this, each voter will list his preferences for the various candidates. If his chosen candidate receives the least votes, his second choice votes will be added to the appropriate candidate. That will be repeated until one candidate reaches a predetermined proportion of the total votes cast, usually an absolute majority.

[79] The single transferable vote is a proportional system designed to minimize wasted votes, to maximize representative government and to promote peace, stability and unity. It is a method of ranking and sharing votes. If the voter's first choice candidate attracts more votes than he needs to be elected then his vote is shared with the voter's second choice. If the first choice is the candidate with the least number of votes, and no candidate gets enough votes to be elected, he will be eliminated and his vote will be given to the voter's second choice. The giving and sharing will be repeated until all seats are filled. The single transferable vote was recommended by the National Committee.

[80] A fault in the system of block voting in Tonga is that it results in inequality in voting power amongst the electors. On the present numbers, a voter on Tongatapu will have three times more effect on the final composition of the Legislative Assembly and therefore on the government than will a voter in the Niuas. With the increased number of people's representatives based on population figures, that disparity will increase because population figures will mean that the number of representatives for the Niuas will remain at one whilst the number from Tongatapu will possibly increase threefold or more. On Tongatapu itself, the block vote may also mean that voters in the more populous urban districts of Kolofo'ou and Kolomotu'a effectively determine the election of all the representatives for the island.

[81] It was a frequently repeated complaint in the outer districts that, once elected, the representative stayed away effectively until the run-up to the next election. That was linked generally with the feeling that the outlying districts did not receive a fair distribution of resources and that they had little or no effective voice on Tongatapu. The more remote the district the greater the problem.

[82] This must be considered together with the effect of the present law which allows voters permanently resident in other districts, if they so wish, to be deemed to be resident in the place where they hold a tax 'api. The potential effect of those votes is substantial. To take the Niuas again, a candidate seeking election will need to canvass for support amongst the Niuas people living on 'Eua and Tongatapu. Their numbers are such in relation to those still actually resident on the Niuas that their support may well be the deciding factor and so he is left with little incentive, beyond his conscience, to bother with visits or even have real concern for the people actually living on the Niuas. At the same time, the difficulty for a representative of a remote district wishing to travel back to his district, especially whilst the Assembly is sitting, is much greater than for a representative from a district on or closer to Tongatapu. Yet those are the very people who most need an effective voice in the Assembly to explain their problems and needs.

[83] Those concerns could largely be addressed by two measures;

- (i) by dividing all districts into constituencies each of which would elect one representative; and
- (ii) by basing the right to vote on the place where the voter resides and discontinuing the deemed residence provision in section 4(4) of the Electoral Act.

The elected member would then be answerable to his constituents and would, therefore, have more need to visit them and hear their voices between election campaigns rather than those of people who have chosen to leave their district and live elsewhere. Equally, every voter in the country would have the same right to elect one representative to the Assembly.

[84] However, these are not simple issues. If there are to be single representative constituencies, it will be necessary to divide the present districts of Ha'apai, Vava'u and Tongatapu into a number of smaller areas. These have been accepted for many years as the historical and traditional districts and removing them may result in one district being pitted against another and, within the individual districts, conflict between opposing candidates creating disunity and consequent loss of peace and stability.

[85] A further consideration may be to allow candidates only to stand for election to the constituency in which they reside. This may have an unfair effect on candidates living in urban areas such as Nuku'alofa where a number of possible candidates may reside in the same constituency because of their work. It may also discourage candidates living in the more distant districts from standing if it means they will effectively be away from their families for an entire sitting of the Assembly.

[86] We note that many who favour retention of the present system of block voting in districts do so in part to ensure it will be possible to elect a new Assembly in 2010 by avoiding the need to introduce new electoral procedures. However, the report on the 2008 election identified substantial defects in such matters as the registration of voters, preparation of the rolls and the efficacy of the checks on voters' entitlement to vote. Whilst the introduction of any new system will inevitably necessitate substantial preparation, even the retention of the present system will need substantial work if the problems of 2008 are to be solved first.

Representation of the Nobles

[87] As has been stated, there was virtually no opposition expressed to the retention of nobles' representatives in the Assembly if they were limited to the present number as has been agreed by the Tripartite Committee.

[88] The nine noble's representatives are elected, at present, by and from a total of twenty nine candidates. It has been suggested that the pool of nobles could be increased if the six matapule ma'u tofi'a were also to be included. If the method of selection remains as it is at present, they would have also to take part in that process by voting as nobles. If

the noble's representatives are to be elected by the people, it will have the advantage of slightly widening the choice of candidates.

[89] Advocates of democracy beyond our shores may well regard retention of the nobles' representatives as inappropriate but the traditional structure of Tongan society, the ties of kainga and the importance of the fonua may make the retention of some nobles' representatives acceptable and even essential in the opinion of many members of the public.

[90] The retention of such a quota undoubtedly allows a very small group a vastly disproportionate chance of election. It has long been a complaint that the nobles have tended to support the government. In the present system in which the King appoints the Cabinet that has been repeatedly seen as an almost inevitable result although the last few parliaments have shown that such support is no longer a foregone conclusion. Under the proposed new composition of the House, the Cabinet is likely to be predominately composed of people's representatives although it is very likely some, at least, of the nobles' representatives will be given ministerial positions and so the nobles' vote will be less unified or predictable.

[91] Unlike the present situation, it is highly probable that the new shape of the Assembly will soon encourage the formation of political parties. If that results in people's representatives being elected along party lines, the nobles' representatives may well see their role as providing a less partisan, moderating voice of reason in the House. We see no justification or need now or in the foreseeable future for a second, upper house either in terms of cost or of efficiency in the conduct of the affairs of the country. In a unicameral system, as at present, the role of the nobles as a mainly independent, and possibly politically neutral, body may exert an influence similar to that of the independent cross benchers in the House of Lords of the United Kingdom Parliament.

[92] There was pronounced preference expressed for the nobles to be elected by all electors but still substantial support for retaining the present method.

[93] Clearly the present system of selecting nobles' representatives is not democratic but that is not the only important consideration. Whilst there is sometimes a discernable tendency for the nobles to vote along ha'a lines, it is not always the case and the general pattern has been to spread representation across the whole of the nobility. Although the 2008 nobles' election returned all three representatives for Tongatapu from the Ha'a Havea Lahi, the previous election in 2005 had resulted in all three nobles' representatives for Tongatapu each coming from different ha'a.

[94] On the other hand, an advantage of allowing the people to vote for the nobles may be that the nobles will see the need to take a far greater interest in the people on their estates by residing there and rebuilding the ties which have noticeably weakened over recent years partly, apparently, because some nobles prefer to live in the capital or abroad rather than on their estates.

[95] A possible problem which could arise from election by the people is that, if they voted for 'their' noble, those with the most populated estates would be likely to be repeatedly elected rather than spreading the representation throughout the whole of the nobility which has been the tendency hitherto. Any such trend is likely to become more pronounced if the effect of such votes is to strengthen the traditional ties between that noble and his people and thus perpetuate their vote.

Women representatives

[96] The Commission has been asked to address the under-representation of women in Parliament by allocating a quota of seats to women as a temporary measure in, say, the next two elections. The hope has been voiced that this would encourage their continued active participation in the running of the country after the quota is lifted.

[97] It is suggested that the virtual absence of women representatives after successive elections over the years is partly the result of a lack of belief amongst women that they would be elected, brought on by the long standing traditional role of men, prejudice and a resultant lack of self belief. The manner of inheritance of noble titles means that, if the nobles are to be elected by the people, women will be further disadvantaged by the fact that the nine nobles' seats reduces the number of seats in the Assembly for which a woman can stand for election. Thus, in an Assembly as at present of thirty two seats, there can be a male candidate for all thirty two seats but female candidates for only twenty three.

[98] The Legislative Assembly has, of course, always had quotas in the form of the nobles' and people's seats and, where there is a block voting system, provision for a women's quota may be relatively simple to manage. In a system using single member constituencies, it would present more difficulty because it may require some constituencies to have only female candidates or possibly the rejection of a man who obtains the most votes in favour of a woman who receives less. In either case, if it is implemented by the temporary allocation of extra seats, it would result in a larger total number of representatives as long as that interim measure is in place.

[99] In many countries where temporary quotas have been given to women, there has been a continued improvement in the number of women elected after the quota has been lifted but generally nowhere near the approximately 50% which would be suggested by the ratio of women to men in the population. The various forms of proportional representative voting increase the chance of women being elected.

[100] There was little discussion of this in the written or oral submissions. Most references to it opposed it although reasons were rarely given.

Overseas Tongans

[101] At present the right to vote extends to Tongans living abroad if they return to the country to cast their vote. Submissions were received advocating an increase in the

opportunity for the diaspora to vote by allowing their votes to be cast overseas or to be able to vote representatives of the overseas communities to the Legislative Assembly.

[102] Much of the support for these proposals stems from the undoubted and considerable contribution the remittances from such Tongans make to national and family economy. It may be more difficult to demonstrate that such contribution is likely to be reduced or even to dry up if there continues to be no elected representatives from these overseas communities.

[103] On the other hand, the majority of Tongans living abroad have chosen to live in a different community. The reasons for their choice will be as numerous as the number of people but their immediate interests will largely be associated with the places in which they live with all the attendant local problems and advantages far removed from the situation in Tonga. Their generous contribution to their families at home is testament to their continuing wish to retain close family and traditional links with their country of birth or origin. If they really wish to play an active role in Tonga, they can return once every few years and exercise the same right as the resident Tongans by casting their vote. However, if the right to vote is to be based on residence rather than place of origin or deemed residence, special provisions will be needed.

[104] The logistical and financial implications of having representatives elected from the overseas Tongan communities attending the sittings of the Legislative Assembly for months each year away from the place where they live would seem to be too great to have any real prospect of implementation.

An independent Electoral Commission?

[105] Most democracies have a separate and independent body with overall control and supervision of such matters as the setting and altering of electoral boundaries, registration of voters and the election process in general.

[106] At present, the Elections Office and the Supervisor of Elections fall under the Prime Minister's Office and the power under the Electoral Act to make regulations on many aspects of the electoral process is given to the Prime Minister subject to consent of Privy Council. In the present system where Cabinet, including the Prime Minister, is appointed by the King, there is little reason to fear unwarranted or politically motivated interference.

[107] In future, the Prime Minister will be an elected member of the Legislative Assembly and so the Commission is considering whether to recommend the removal of all electoral matters to an independent electoral commission.

The desire for an election in 2010

[108] Ever since the last election in April, 2008, discussion has centred around, and an expectation has been widely held of, an election under the new system in 2010. It has

been stated by His Majesty and repeated by the Government. The Act itself refers to the “general expectation that substantial changes shall be made by 2010 and that the Legislative Assembly elections under the changed system will then be held”.

[109] Repeated references and comments in the submissions to the Commission have revealed a widespread anxiety that, despite repeated assertions that this is still the universal aim, the determination to achieve it may have declined or even been reversed. This is especially directed at the Government but also at this Commission.

[110] We have already referred to the limited time allowed the Commission by the Act and to our commitment, despite it, to complete our deliberations in the time allowed so that we will present our final report by 5 November, 2009.

[111] However, that is only one step in a longer and less predictable process. The recommendations in our final report will need to be considered and the draft legislation we attach to the report to implement the changes will then have to be debated and passed by the Legislative Assembly. If there is any substantial opposition or amendment to the legislation, that debate may be prolonged. Once passed, there will be a probable need for further administrative arrangements to give effect to the new legislation.

[112] If 2010 is to be an election year, the Prime Minister is empowered by clause 77 of the Constitution to fix a date “for an election between January and June” in that year. That leaves very little time between the publication of our report and an election next year.

[113] If the Commission’s final decision is to recommend such substantial changes to the electoral system that their implementation would be likely to delay the election date beyond 2010, a possible remedy would be to recommend that the 2010 election be conducted under the present law with changes only to the number of representatives. It would then be recommended that any further changes be placed before the next Legislative Assembly for debate within one year of the election. The difficulty is that the government elected under the present system may see little need for further changes and, indeed, a possible risk to its own future election. Also, as has already been mentioned, the Act expects the election in 2010 to be held “under the changed system”. Whilst the number of representatives would be changed that would only be a partial compliance with the statutory requirement.

[114] A much easier solution may be to amend clause 77 to allow the Prime Minister to fix a date “for an election between January and December”. In the light of the stated commitment of most members of the Legislative Assembly to an election in 2010, it is to be hoped that they would be willing to hold a longer session starting considerably earlier in the year than is usual. That should provide sufficient time for debate in the House, for the necessary reforms of the electoral process and public explanation of the new system to satisfy the widespread expectation of an election next year.

Some Concluding Reflections

[115] Following His Majesty's statements, the Commission's work so far has confirmed a strong wish in the majority of the public to have more representative government. Alongside that is an almost universal recognition of the Monarchy as an integral and essential part of Tongan tradition and culture. The manner in which those two opinions lie easily together in the minds of the public is, in itself, a manifestation of the uniquely Tongan way the country has adapted and developed over more than a century and a half since Taufa'ahau became Tu'i Kanokopulu and took the first steps to unite Tonga as a kingdom.

[116] The Commission has heard frequent reference to the peace, stability, security and continuity the present order has given the country. Whilst it has been a common theme to pay tribute to the Constitution for providing a stable system of government, it is clear that many – perhaps most – people who would correctly give it credit for that stability have little knowledge of its actual provisions and their effect. They nevertheless hold the general view that the Monarchy has been the principal keystone of the country's stability over many generations.

[117] The difficulty this presents to the Commission is that the average Tongan has had little opportunity to consider the real significance of the matters the Commission must consider and possibly recommend should be changed. The sensible way to achieve the appropriate mix should have been to allow sufficient time for measured consideration and development of the various changes. A substantial period of consultation and, more importantly, instruction about these matters prior to appointment of the Commission would have ensured a better appreciation by the general public of the process in which it was involved and thus an opportunity to evaluate and, if necessary, stop or modify the changes before they were implemented.

[118] There are immediate plans, as part of this overall project, to commence an extensive separate public awareness programme, which will continue after the final report of the Commission, has been published, with the aim of explaining and clarifying its recommendations as widely as possible. This is vital if the full implications of the changes are to be fully understood. The anxiety for rapid change has prevented advance preparation in the country as a whole with the result that the principal thrust of the submissions has come from politicians who could be personally affected by the changes that may be recommended rather than from the people who will, by their votes, collectively determine the composition of the Assembly and of the next Government. Whilst the time available for further submissions is short, we hope this report will encourage further input from individuals or groups from the public in general.

[119] Following the talanoa with the National Committee, the measure of agreement in the Tripartite Committee and the feeling of consensus which accompanied them, there now appears to be an unfortunate lack of continuing dialogue between the various members of the Legislative Assembly. The changes in the structure of the Assembly will have a fundamental affect on the government of the country as a whole. People still look

to their leaders for guidance and yet the visible manifestations indicate a continuing partisan approach by those leaders rather than a common wish to achieve a result that all can support.

[120] The changes to the composition of the Legislative Assembly are generally understood but the consequences of a government entirely controlled by the votes of the electorate are rarely mentioned. The change from a paternalistic system of appointed ministers under a benevolent monarch to an elected government answerable to the people who elected them is profound. Many of the increased number of representatives elected to the next Assembly may have no parliamentary experience at all. It is not unreasonable to anticipate a new government consisting entirely of ministers who have had no experience of governing. Even those who have parliamentary experience have achieved that experience in an Assembly where they have had no true power. Now they will have power.

[121] That is one form of democracy. Many countries have adopted democratic government in stages each edging closer to the final goal. The anxiety for change by 2010 means that Tonga is asking to achieve almost the total transition in one step. Once done, it is done and a profound change will have been made.

[122] The Tongan people, their active use and preservation of a living culture and traditions together with all that the fonua means, make this country unique. The social structure of King, nobles and commoners features much higher in the day to day life of many Tongans than the constitutionally important separation of powers into executive, legislative and judicial upon which King Tupou I founded his vision of a modern and just society. All this unifies and binds the country. The people's undoubted pride in their Tongan character stems from these features. The Commission acknowledges the desire both of His Majesty and his people for change but it must try to ensure that the extent and timing of the changes it recommends will not drive Tonga to reach for some universal interpretation of democracy in such a way that it irreversibly loses the very soul of its unique identity.

[123] Every effort must be made by all closely involved and responsible, together, to make the maximum use of the time available to ensure, by mitigating the difficulties, a positive and lasting outcome. That is certainly the Commission's aim.

This fifth day of June, 2009

This version of the Interim Report of the Constitutional and Electoral Commission issued on the 5th of June has been authorised for release by the Director of the Constitutional and Electoral Commission.