

Press Release

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FOR IMMEDIATE RELEASE

Colours Cayman's Comment On The Anti-Bullying (Schools) Regulations

Colours Cayman appreciates the opportunity to provide feedback on this important issue. Our responses are structured in two parts: policy and legal concerns.

POLICY CONCERNS

Colours Cayman is of the view that there should be, as a matter of good policy, a pre-disciplinary stage to deal with the underlying factors of bullying.

Bullying is often the consequence of community leaders or parents encouraging the verbal or physical fear, intimidation, humiliation, distress or other forms of harm. In these circumstances, to effect disciplinary powers on a young person for, in effect, doing what their parents or community leaders encourage them to do seems unfair and, moreover, unlikely to lead to any behavioural change, which, in the end, should be the ultimate aim of the disciplinary process.

If an actual change is ever likely to occur, there must be a space in the school where the victimiser's attention can be drawn to the detrimental effect of their conduct and, in particular, to discuss openly the rationale, whichever this may be, for such behaviour.

In order to achieve this, the Regulations should be amended to include a 'Section' on Alternative to Disciplinary Proceedings (ADP) to deal with the issue of bullying. In doing so, the *Ministry of Education* should be tasked with regulatory implementation and oversight. In addition, each school should be required by law to draft a 'Community Dispute Resolution for Bullying' to be approved by the *Ministry of Education*.

LEGAL CONCERNS

Colours Cayman is of the view that the definition of bullying proposed in Section 3. (1)(c)(iii) is both incomplete and unlawful.

The proposed definition states:

3. (1) An anti-bullying policy shall include provisions which–

...

(c) prohibit, for the purpose of bullying, written, verbal communication or unwanted physical contact including–

...

iii. negatively commenting about a person's looks, clothes, body, sex, race, colour, language, religion, political or other opinion, national or social origin, age, mental or physical disability, property, birth or other status; or...

The above definition is incomplete because it omits 'sexual orientation and gender identity' (SOGI). This omission is by no means resolved by the addition of 'other status'; in fact, 'other status' is of dubious lawfulness—for reasons that we shall provide below—such that any person could be found guilty of bullying based on 'other status'. We shall refer to each of these issues in turn below.

THE OMISSION OF SOGI

Discrimination on grounds of SOGI is endemic in the Cayman Islands. The Former Governor of the Cayman Islands Helen Kilpatrick in her parting message expressly highlighted this issue when she stated: 'One issue though, that [UK] ministers have consistently mentioned during their visits, has been the lack of recognition of LGBT rights in the Cayman Islands. They all expressed their hopes that the government would bring forward legislation to bring the territory into line with the *European Charter on Human Rights* and with the Cayman Island's own Bill of Rights which prohibits discrimination.'

This is an opportunity to start complying with our own Constitution. The need for such an inclusion is not theoretical but sufficiently evidenced by the actions of some of our own politicians who frequently call for sexual hatred and violence against Caymanians on grounds of their SOGI. A few examples to illustrate this point:

1. In August 2015, the Deputy Chair of the Legislative Assembly, Mr Anthony Eden, made statements in the Legislative Assembly that included:
 - describing homosexuality as 'deviant behaviour', 'wicked and immoral' and a 'social and moral evil';
 - threatening violence towards homosexuals; and
 - equating homosexuality with bestiality and paedophilia, including suggesting that 'crushing a baby's skull and sucking their brains out had become a human right'.¹
2. More recently, the Minister of Education Miss O'Connor Connolly incited to sexual hatred and violence against LGBTI people when she called publicly to gate crash a same-sex marriage ceremony.²

These are just two incidents but very important examples because they show how our leaders encourage the behaviour that these regulations aim to stop. It is precisely only by admitting that bullying on grounds of SOGI is an entrenched problem in the Cayman Islands schools and tackling it, as it is aimed to be done with the other grounds, by including SOGI amongst the prohibited grounds that we are going to achieve a more inclusive and eventually more tolerant society in the Cayman Islands. All Caymanians should feel welcome and safe at school so that they reach their full potential; this includes LGBTI Caymanians.

By excluding SOGI from the list of prohibited conducts, which includes inter alia property, these regulations are insulting LGBTI Caymanians and are an affront to a minimum sense of decency of the Cayman Islands society at large. Neither the LGBTI Caymanians nor the society at large deserve such a disfavour.

THE USE OF 'OTHER STATUS'

These regulations shall have the effect of giving rise to a form of liability that may be construed as akin to a criminal one. This is so because the consequences of being found guilty for having breached these regulations are severe and include, pursuant to the proposed Section 3. (1)[e], detention, suspension, expulsion, exclusion, and community service; the last being typical of criminal punishment and any of them likely to leave an indelible mark on the experience of the young offender if not preventing them from ever completing their education. It is for these reasons that the grounds for liability must meet the principle of legality, in particular two of its accepted three manifestations: maximum certainty and strict constructions.

It is self-evident that finding someone to have breached the prohibition to comment regarding another person's 'other status' will require analogy rather than strict construction. In other words, before someone can be found to be in breach of 'other status', one must first clarify what the term 'other status' intends to encapsulate. More importantly, it makes it impossible for the bully rationally to choose to do that which is prohibited when 'other status' is left open to interpretation. In these circumstances, the 'maximum certainty' principle cannot be achieved since the bully does not know or is required to guess what the term 'other status' means. In other words, the bully is unable, knowingly, to commit an act which is prohibited.

To the extent that the principle of legality is breached by these regulations, article 7 of the *European Convention on Human Rights* will be breached and therefore so too will be Section 8 of the Cayman Islands Constitution.

A final word regarding the victim of bullying: the term 'other status' also leaves the victim unsure of whether they are protected from the form of bullying that they suffer.

1. Hansard Report of the Cayman Islands –Session 13 August 2015 [2015:350-2]
<http://www.legislativeassembly.ky/portal/pls/portal/docs/1/12368401.PDF>

2. <https://caymannewsservice.com/2019/04/minister-disruption-gay-wedding/>