



## Cayman Islands Human Rights Commission

*promoting, protecting and preserving human rights*

Honourable Alden McLaughlin Jr., MBE, JP  
Premier and Minister of Home and Community Affairs  
5th Floor Government Administration Building  
Grand Cayman KY1-9000  
CAYMAN ISLANDS

16 November 2015

Via E-mail: [kristy.watler@gov.ky](mailto:kristy.watler@gov.ky); [roy.tatum@gov.ky](mailto:roy.tatum@gov.ky)

Dear Honourable Premier,

I refer to your letter of 21<sup>st</sup> October. Thank you for engaging with the Commission on this most important issue.

As you are aware, under the Constitution the Commission is required to publish all responses it receives to its recommendations unless there is good reason not to. As such I think it right that I publish your letter and this response, however, if you disagree and think that there is good reason for the Commission not to publish our correspondence can you let me know? In the event that you have no objection I propose to publish both our letters next week.

I am grateful for your acknowledgment of the current difficulties with our immigration framework which has been implemented in a discriminatory manner and for confirming that the Government is considering changing it to ensure people who have legally-recognised same-sex unions in other countries have the right to have those unions recognised in Cayman. The Commission urges the Government to achieve this change as expeditiously as possible.

It is with regret, however, that I note the contents of the rest of your letter. I think that it is appropriate that I point out some of the difficulties with the stance which the Government appears to be taking.

## The law

First, I must disagree fundamentally with the legal advice that you have been given regarding the ECHR case of Oliari. The “gradual maturation” approach to which you refer, and upon which you state that the Government’s refusal to grant equal rights to people because of their sexual orientation is legal, refers to an argument which was put forward by the Italian government in Oliari and rejected. Indeed the ECHR specifically disapproved of this argument when ruling against the Italian government.

The Italian government had argued that since it had *“in many ways, demonstrated that they recognised homosexual unions as legally existing and relevant, and that they had offered them specific and concrete forms of legal protection, through judicial and non-judicial means”*<sup>1</sup> the “gradual maturation” argument should be engaged.

The Italian government listed examples of the legal protections it offered to same-sex couples. These included in areas such as; housing; tort claims; access to employment welfare benefits; adoption rights; and the existence of agreements related to sharing of expenses, allocation of ownership of assets acquired during cohabitation, the manner and use of a shared residence, distribution of assets on the termination of cohabitation, rights in cases of physical or mental illness or incapacity, and acts of testamentary disposition. It noted that certain municipalities even had registers of civil unions and that legislation was in place to provide for equal treatment in employment and occupation<sup>2</sup>.

I note that not one of these rights exists for LGBT people in the Cayman Islands and that people can be (and are) currently discriminated against in all of these areas.

Notwithstanding these arguments and noting that it had *“already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship”*<sup>3</sup> the Court went on to hold that:

“the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole. They however considered that “time was necessarily required to achieve a gradual maturation of a common view of the national community on the recognition of this new form of family”.”<sup>4</sup>

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<sup>1</sup> Paragraph 127

<sup>2</sup> Paragraphs 128 – 131

<sup>3</sup> Paragraph 165

<sup>4</sup> Paragraph 176

With respect, your letter also fails to identify any such issue. Rejecting the “gradual maturation” argument the Court said:

“the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.”<sup>5</sup>

I have no doubt, particularly in light of the total absence *even of any of the rights alluded to above*, that the Court would also rule against the Cayman Government if a case were brought today. Can I invite you to reconsider the advice that you have been given? There should be no doubt about it - we are in breach of the law.

### The Government’s mandate

Second, I am afraid that I disagree with your suggestion that, even if it was minded to, the Government has no mandate to change the current position. With respect, the Government has full power to pass laws for “the peace order and good government” of the islands. This includes complying with our obligations under international law. The Government does not have to seek a referendum every time it wishes to pass a law and this issue is, respectfully, no different from any other, save that the need for legislation is so clear and immediate.

You suggest there is no consensus for change, conversely, I am constantly struck and heartened by the support that the community, particularly young Caymanians, have for their fellow Caymanians and residents who are the victims of discrimination because of their sexual orientation. It may of course be the case that others in our community do not feel able to speak out publicly for fear of becoming victims to the sort of vilification and abuse that was so regrettably perpetrated in the Legislative Assembly recently. These sorts of highly unpleasant attacks are doubly worthy of condemnation; not only are they thoroughly reprehensible in of themselves (for the reasons I articulated in my earlier letter and refer to below) but they also serve deliberately to intimidate those who seek the “gradual maturation” which you say the Government is actively striving for. There can be no “gradual maturation” where people are abused and threatened with violence, even from within the Government, when they ask for basic rights. For these reasons I encourage you to find a way for Government to engage with the less vocal members of our community on this issue; I suspect that you may find that your concern that there is no consensus for change is not necessarily accurate.

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<sup>5</sup> Paragraph 185

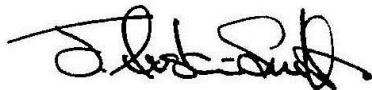
More importantly, I'm sure you will agree, one of the core functions of Government is to demonstrate leadership by doing the right thing, not simply to follow those who are shouting loudest. It may be that your Government regards this issue (rightly or wrongly) as one without consensus for change but, with respect, I urge you to give direction and leadership on this issue and say that your Government will not be a party to the continued victimisation of members of our community for no reason other than their sexual orientation.

The Commission's recommendations

Finally, as you will recall, I closed my last letter to you with a series of recommendations made pursuant to section 116(7) of the Constitution. I note from your letter that you have no intention to accede to the first and second of these and introduce legislation to recognise same-sex unions or even to outlaw discrimination on the basis of sexual orientation. This is a cause for regret.

The Commission's third recommendation was that you issue a statement condemning statements made in the Legislative Assembly by a member of your Government, amongst other things, likening LGBT people to paedophiles and those who practice bestiality, describing them as "deviants", "wicked", "immoral" and "evil" and even threatening violence against them. With respect you have failed to respond to that recommendation. Whatever our differences of opinion on the Government's legal obligations I hope you can agree with me that this was deeply unpleasant abuse, likely to incite hatred and is worthy of condemnation in the strongest possible terms - I encourage you at the very least to say so publicly.

Yours sincerely,



James Austin-Smith  
Chairman Human Rights Commission

cc: Her Excellency the Governor