

STATEMENT OF THE HUMAN RIGHTS COMMITTEE PUBLIC MEETING ON THE CONSTITUTION 19 FEBRUARY 2009

Members of the Human Rights Committee are appointed by Cabinet to function as an independent body, to assist and advise the Government and the people of the Cayman Islands about how best to protect people's rights. Our terms of reference require us to seek the best possible protection for the people. The idea of protecting the rights of human beings is not new. It comes from ancient wisdom. As Jesus himself said: "*Verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.*" (Matt. 25:35-40).

We approached the constitutional process like a lawyer advising the people of the Cayman Islands. We tried to negotiate the best bargain to protect the people's rights at the table. We then tried to give full advice about the outcome and in particular what the shortcomings are. In any good lawyer client relationship, the lawyer's duty is not to tell the client what to do, but to make sure that the client has the full picture before making up his or her own mind. This is part of the process of educating and advising the Government and the people. There are a number of shortcomings which we have discussed or will continue to discuss leading up to referendum day.

Language and drafting

The first and perhaps most important difficulty with the draft Constitution is the overly complicated language and the lawyer-like way in which it says everything. It is difficult for all of us to understand exactly what it covers and what it leaves out. For that reason, the HRC is going to try to work on producing simple explanations of each sections in the coming weeks as part of our responsibility to educate and advise.

Delay in relation to youth offenders

We are also concerned about the agreement to delay the implementation of section 6(3) for four years. This is the section that requires the Government to separate children in custody from adult prisoners. We do not understand the reason for this long delay, because this is not a question of putting up a building which, we accept, might require significant resources. It is simply a duty to make proper arrangements not to put pre-teens and teenagers in Fairbanks or Northward or holding adult prisoners in Eagle House, as is currently the case.

Right of non discrimination

With regard to section 16, the original draft dated 24 October 2008 (as well as CIG drafts of 30 September 2008 and 6 October 2008) we had been working with in the negotiations all along said the Government could not discriminate against anyone at any time. Full stop. The Hon. Minister McLaughlin told us that the churches could not accept such a wide-ranging right applying to gays and lesbians. On the other hand, the UK and the HRC could not condone gays and lesbians being left out altogether. So a proposal was put forward, which was first explained to us on 8 January 2009. This question was put to us: *what if we reduce the right or cut the right in half so it is limited only to the basic things like the right not to be tortured and doesn't go so far as to include everything?* That way we can put everyone in but they are not getting as much as the original version of the right gave them.

The Government produced a written proposal on 14 January 2009 to change section 16, which was circulated to all of the delegates. That written proposal explained the motivation for the change as follows: **"The effect of such a formulation would be that if, for example, "other" discrimination were held to include discrimination against homosexuals or transsexuals, such discrimination would only fall foul of this section [16] if it were in respect of the rights set out under Part 1 of the Constitution (the Bill of Rights)."**

The change was agreed at the final round of talks on 2-5 February 2009 (i.e. 2 weeks after it was first proposed in writing) and in spite of the written and published objections of the HRC

that the proposal adversely affects all vulnerable people (not just gays): copy available on our website.

It is important to understand this because we are not saying that any one group is left out of rights that other people are enjoying. The list of the groups did not change, except to include gays and lesbians. Children, women, the disabled and the elderly and everyone else will still be included in the right, but the extent of the right itself was changed so that the Government could discriminate against all of those people in certain areas.

This is why the Hon Leader is asking the country to accept half a loaf on this; because the other half is what was removed. But, let's be clear. Everyone (not just gays) gets only the half loaf. The other half is being taken away from the other vulnerable groups too, who will lose the protection against discrimination that is being taken out of the right. The proposal to change section 16 fully acknowledged that this would be the case. It started by explaining how the original draft would have protected people, giving an example of its impact on the elderly. The written proposal said: **"As presently drafted the section is known as a "free-standing" non-discrimination clause. That is, it applies to all unjustifiably discriminatory treatment on the part of government, and would therefore cover hospitals (e.g. refusal of intensive care treatment to people over a certain age), counseling services, etc."**

The Government also explained what they might consider reasonable and objective reasons for discriminating in relation to employment. The government's written proposal said. **"...subsection 3 of section 16 now [as originally drafted] provides specifically that different treatment will not be considered discriminatory if it can be objectively and reasonably justified and is not disproportionate (this kind of provision would, for example, permit the police to employ men only for certain tasks)." (emphasis added)**

That is why the HRC were duty bound to explain to the public what this means for them. The Government will be able to discriminate against anyone in the areas of healthcare, housing, employment, provision of social services, access to public spaces and many others because these are no longer covered. The Government's own written proposal recognised that fact. The

UK said that what the HRC wants (which is the original s.16 that said the government could not discriminate against anyone at any time) is the ideal solution, but the country is not ready to do more than take baby steps towards that ideal on some distant horizon.

We want to be clear. The HRC is not determined to campaign against the Bill of Rights. We support advancement and agree that the alternative is worse if the alternative is nothing. We have publicly asked the Government to give the people the right to choose for themselves in the referendum between the full right not to be discriminated against or the limited right which is now in the final draft. That request was publicly rejected at a press conference on 16 February 2009. The HRC's obligation is not to campaign for or against anything but simply to educate and advise the people so that they can make an informed decision.

Right to silence

There was one other change, which the HRC only became aware of on the last day of the talks on 5 February 2009. There was a new proposal, to take out the right to be told that you have a right to silence if the police arrest you. The HRC noted that it had not been discussed or debated fully with all participants or at the earlier rounds and that it could not be dealt with in five minutes. The HRC appeared to be the only delegation that objected to this change. We explained that the Criminal Defence Bar Association had prepared a paper in July 2008 which spoke out against proposed legislation to this effect and asked the other delegates to wait until that paper could be tabled and fully considered. In spite of that objection, the right was removed without further debate or consideration.

This statement was issued on behalf of the Human Rights Committee. Although appointed by Cabinet, we function as an independent body and our terms of reference can be viewed at www.humanrights.ky.