



**Cayman Islands
Human Rights Commission**

promoting, protecting and preserving human rights

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Via E-mail: dorine.whittaker@gov.ky

Dear Ms. Whittaker,

As you will be aware, the primary responsibility of the Human Rights Commission is to promote understanding and observance of human rights in the Cayman Islands. In order to fulfill this constitutional remit the Commission chooses to avail itself of opportunities to review draft legislation. As such the Commission has now completed a review of The Adoption of Children Bill, 2012 (“the draft Bill”) and takes this opportunity to set out its concerns and observations regarding the content of the said draft legislation.

The Adoption of Children Bill, 2012

Human Rights Concerns

1. Part 3 – Making of Adoption Orders – S.14(1)

It is noted that only couples who are married can apply to adopt a child and therefore there may be challenges to this provision by same sex couples, who cannot be considered legally married under Cayman Islands law.

2. Part 3 – Making of Adoption Orders – S. 16(1)(a) and S.16(2)(a), (b) and (c)(i)

These sections prescribe when adoption orders shall not be made. Of concern to the Commission are the following sections:

16(1) unless the applicant, or in the case of a joint application, one of the applicants -

(a) has attained the age of twenty-five years but is not over the age of sixty-five years, but the court may, in its discretion, having regard to the views of the Board and the findings of the Department, make an order in favour of an applicant who is over sixty-five years of age;

16(2) (a) in respect of a child who is a female in favour of a sole applicant who is a male;

(b) in respect of a child who is a male in favour of a sole applicant who is a female; or

(c) where both the child and the applicant are the same sex but the applicant - (i) is known or suspected not to be heterosexual.

While the Commission understands that it is necessary for there to be discretion regarding adoption eligibility, especially when considering the best interests of the child; at present the criteria could be challenged as discriminatory in accordance with s.16 of the Bill of Rights, Freedoms and Responsibilities (BoRFR). As with all rights contained in the BoRFR, s.16 applies to the rights set out within the 2009 Constitution and affords protection against discrimination in relation to another listed right; in this case s.9 (private and family life) and s.17 (protection of children). Discrimination, for the purposes of this section, is defined as affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status; with the exception if the law is reasonably justifiable and proportionate to its aim in the interests of defence, public safety, public order, public morality or public health and reasonably justifiable in the interests of a democratic society. If there is no acceptable justification for the apparently discriminatory treatment, the provisions could fall foul of the Bill of Rights.

The provisions referred to above may be challenged as discriminatory in a number of ways:

- a. s.16(1)(a) could be challenged as alleged discrimination on the basis of age. While the court has the discretion to still make an order in favour of someone over the age of sixty-five, it has no discretion to make an order in favour of someone younger than twenty-five. Some acceptable justification must be provided for the treatment of persons younger than twenty-five who wish to adopt but would be considered ineligible under this provision.
- b. S. 16(2)(a), (b) and (c)(i) could be challenged as alleged discrimination on the basis of “sex” or “other status”. In order for s.16 of the draft Bill to comply with the BoRFR there would have to be strong evidence to suggest that allowing inter-gender adoption and/or a person that is not heterosexual to adopt would cause legitimate concerns in the interests of defence, public safety, public order, public morality or public health and is justifiable in a democratic society.

The Commission would like to request that the Cayman Islands Government put forward detailed justifications for the provisions detailed above in order that the Bill can again be reviewed.

Additionally, there could be an argument that the proposed treatment of persons under 25, homosexual persons or single parent candidates (i.e. making blanket prohibitions on their eligibility to adopt in certain circumstances rather than considering the best interests of the child in each individual case) could reduce the pool of potential adopters, therefore undermining the rights of children available for adoption to family or parental care and causing further potential infringements of their human rights.

3. Part 3 – Making of Adoption Orders – S. 18

This section requires the consent of at least one grandparent when a minor puts their child up for adoption. The Commission would hope that there would be other avenues for a minor should none of the grandparents agree to an adoption. In the case of a fourteen year old minor who has a baby but whose own parents refuse to allow the child to put up for adoption, there must be some alternative to ensure the best interests of both minors are met. As is the section seems restrictive.

In addition to the above comments, the Commission continues to be concerned with the comments as set out in our letter to your Ministry of 9 January, 2012 regarding the delay in dealing with adoption cases as reported by the previous Minister, Mr. Mike Adam. Any undue delay raises the possibility of challenges under s. 17 (protection of children) of the BoRFR. In order to comply with international standards for protecting the best interests of the child these delays must be remedied. The Commission notes that the draft Bill builds in prescribed timelines in order to avoid undue delays moving forward and this is commended. However, the Commission wishes to know what the Ministry's plan is for ensuring that all outstanding adoption cases are dealt with in a timely manner.

General Comments

1. S.6(5)

As a note the punishment seems relatively small.

2. Appeals by Persons Desirous of Adopting Children

S.10(2) - who is the "him" referring to - the child or the person trying to adopt?

3. Definitions

It is noted that there are no definitions for the terms guardian ad litem (s.17(5)(a)) or grandparent (s.18).

4. Timeframes

It is noted that the Bill does not indicate whether the days noted are working or calendar days.

5. Part 3 – Making of Adoption Orders – S.15

This section makes reference to s.14(3) which does not exist.

6. Best Interests

Throughout the legislation the reference to 'best interest' should be changed to reflect the term 'best interests'.

While our review should not be considered as a substitute for legal advice the Commission would like to reiterate that the human rights concerns outlined above are matters of grave concern and

therefore we strongly encourage the Ministry to undertake further consideration of this draft bill. As a note, the Commission intends to make this letter available to the public within seven (7) days of your receipt.

Kind regards,

A handwritten signature in black ink, appearing to read 'Richard Coles', written over a horizontal line.

Richard Coles
Chairman
Human Rights Commission