



Cayman Islands Government  
Government Administration Building  
Grand Cayman KY1-9000  
CAYMAN ISLANDS

REF: CFS/LEG/1

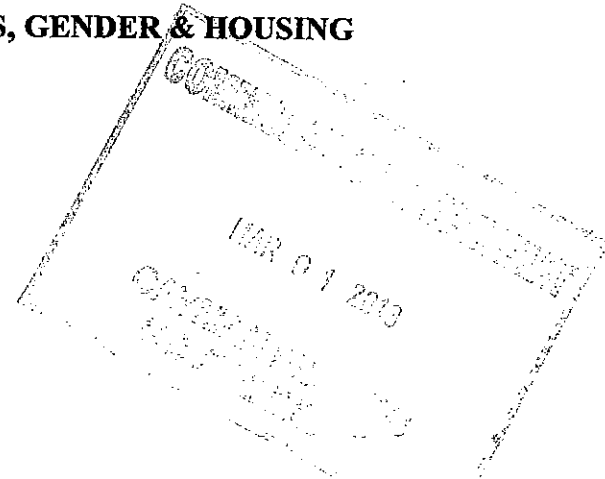
Tel: 345-949-7900 ext. 2424  
Fax: 345-949-3896  
Email: dwayne.seymour@gov.ky

**Cayman Islands Government**

**MINISTRY OF COMMUNITY AFFAIRS, GENDER & HOUSING**

8 February 2013

Mr. Richard Coles  
Chairman  
Human Rights Commission  
PO Box 391  
Grand Cayman KY1-1106  
CAYMAN ISLANDS



Dear Mr. Coles,

Thank you for your letter, dated 6 February 2013, regarding your concerns and observations on the Adoption of Children Bill, 2012 ("the Bill"). Your input is always valuable and, consequently, the Ministry and Senior Legislative Counsel in charge of the drafting examined the issues raised and respond as follows:

**Human Rights Concerns**

**1. Making of Adoption Orders (S. 14(1)) – right or otherwise of same sex couples to adopt**

You raise the possibility of this section being successfully challenged on the basis that it restricts adoption rights to married couples only. In theory there are two possible avenues of challenge: (1) the Cayman Islands Constitution Order 2009 ("the Constitution"); and (2) the European Convention on Human Rights. Regarding the Constitution, section 14(1) guarantees the right of persons to enter heterosexual marriage and found a family. On the other hand, section 16 of the Constitution guarantees freedom from discrimination on a number of grounds including "other status", which can be construed to include sexual orientation. First, the right in section 16 is not absolute. That section itself prohibits discrimination only when it is "unjustifiable", and allows it where a law has "an objective and reasonable justification and is reasonably proportionate" to its aims. Further, "public morality" is a valid ground for discrimination. In terms of current ethos in the Cayman Islands, as expressed in section 14(1), which was enacted as recently as 2009, the Ministry is satisfied that it would be justifiable to make the restriction in the draft. Furthermore, in terms of technical legal interpretation, the particular provision (section 14(1)) qualifies the general (section 16). Accordingly, section 16 cannot be read as abrogating or undermining section 14.

With regard to European human rights standards, Article 8 of the European Convention on Human Rights protects the right to family life, which, generally speaking, is similar to the right to "found a family" under section 14(1) of our Constitution. However, the European Court on Human Rights has not yet considered whether same sex relationships constitute family life, nor has it considered whether same sex couples should have a right to adopt children. (Public events in Europe at present seem to support this

observation.) For this reason, there is a margin of appreciation applied by member countries of the EU as to what constitutes marriage. The Cayman Islands have taken advantage of this margin of appreciation to define marriage in heterosexual terms. Accordingly, the Bill, in restricting the right to adopt to married couples, is not in violation of any clearly established principle enunciated by the European human rights system.

What is more, there is no legislation in the Cayman Islands governing civil partnerships. It would therefore be a rather big leap in our legislation and social evolution at present to consider granting the right to adopt to couples who are neither married nor are in a civil partnership. However, the Ministry will continue to monitor the progress of issues in the EU with a view to meeting our obligation when they are more clearly defined.

## **2. Making of Adoption Orders (S. 16(1)(a)) – age restrictions on adoptive parents**

The matter of age discrimination was discussed before making the draft public, but it was determined that this limitation was justifiable under the Constitution. The policy reason behind the lower restriction (besides that is in the current Adoption of Children Law (2003 Revision)) is that before someone reaches the age of about 25 years, it is likely that he/she is not settled enough in life to undertake the onerous responsibility of raising another human being. As to the upper limit of 65 years, the obvious reason is that a person in the twilight years of their life may not be equal to all the challenges of raising a child or living long enough to see the child grow into adulthood. Indeed, the countries we have researched, such as the U.K., Australia and others have age limits.

That said, the Ministry understands your concern that there is a discretion conferred on the Court to grant adoptions to persons who are over 65 years, where there are special circumstances, while there is no such discretion in relation to persons who have not attained the age of 25 years. The Ministry believes that such flexibility is justified also in relation to the lower limit. Accordingly, the Ministry is considering amending the Bill to take this into account. This would also ensure that the differentiation is within the allowable limits of section 16.

## **3. Making of Adoption Orders (S. 16(2)(b) and (c)) – sex and “other status” restrictions**

Whereas it is correct to say that this amounts to discrimination, the reason behind the differentiation can pass the test of being justifiable, reasonable and proportionate. Overall, the purpose of these restrictions is to protect children from circumstances that could result in sexual abuse. While the criteria for an adoption order may appear to be excluding suitable adopters (i.e. female sole applicants of male children and vice versa and those of “other status”), section 16(2) of the Bill also allows for special circumstances to be considered: “...unless the Grand Court is satisfied that there are special circumstances which justify making such an order.” The discretion conferred on the Grand Court to grant adoption to a single parent of the opposite sex in special circumstances, are enough to pass the test of validity under the Constitution. Further, subsequent to an additional internal review possible amendments to this section have already been explored in regards to “other status” restrictions. However, the exact wording is still being finalised.

## **4. Making of Adoption Orders (S. 18) – consent to adoption**

Your comments on this issue are valid and the Ministry will address them in the Bill. However, the exact amendments are still being discussed.

**5. Outstanding Adoption Cases**

The Ministry and the Department of Children and Family Services ("the DCFS") take the concern of timely processing of all adoption matters as being in the child's best interests. As such, the DCFS is presently undertaking recruitment to hire 3 additional social workers to handle case work matters and, at the same time, looking at the reassignment of cases to facilitate having 2 or 3 workers who have proven to be adept at producing high quality reports in a timely manner for adoptions. These workers will carry caseloads of a majority of all adoption matters in an effort to expedite Home Studies and Court Supervision Reports.

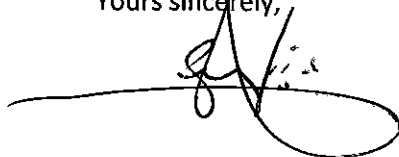
It must also be borne in mind that apart from the timely completion of reports, there may be other factors which can delay the Adoption process which may not rest wholly with the DCFS, such as birth parent(s) consent, an applicant awaiting a child for adoption, or where the applicant has not provided the relevant documentation required by the Adoption Board.

**6. General Comments**

The Ministry will also address your general comments, most of which seem to simply require clarification. In relation to section 6(5), regarding the penalty for failure to return a child, this is about failing to return a child who has been in the lawful care of someone. Whereas this too is a serious matter, the Ministry believes that the penalty is adequate. It should be noted that this situation is different from cases, for example, in clause 7 where a person offers or receives payment for adoption. This carries a fine of KYD\$30,000 and a year's imprisonment.

Thank you for your valuable input on the Bill. I trust that your concerns will be alleviated with the additional information the Ministry has provided above.

Yours sincerely,



Dwayne Seymour  
Minister of Community Affairs, Gender & Housing

cc: Dorine B. Whittaker, Chief Officer, Ministry of Community Affairs, Gender & Housing  
Alicia (Jen) Dixon, Director, Department of Children and Family Services