



The Hon. Walton Brown JP MP  
Minister of Home Affairs  
Government Administration Building - First Floor  
30 Parliament Street  
Hamilton HM 12  
Bermuda

November 15, 2017

Dear Minister Brown,

**Re: *Response to the public consultation on the Draft Domestic Partnership Bill***

Thank you for the opportunity to provide feedback on the proposed Domestic Partnership Bill. OUTBermuda is always looking for meaningful avenues to provide feedback and insight on issues that affect the LGBTQ community in Bermuda, and welcomes the ability to make representations on this specific legislative proposal.

OUTBermuda supports marriage equality. All Bermudians, regardless of sexual orientation, ought to have the Government recognize their commitment to each other through marriage, with all accompanying rights and obligations.

In the lead up to the referendum on marriage equality and civil unions last year, OUTBermuda openly recognized that while marriage equality is a noble goal, the majority of our country's citizens were not yet ready to embrace it. At the time, we took that view that it was in the best interests of our country for us to propose a compromise on the issue, and on that basis we advocated for civil unions. That compromise was roundly and aggressively rejected by those opposing marriage equality.

The outcome of the referendum is common knowledge: it triggered a divisive and bitter debate about the place of LGBTQ people in our community, it buoyed an aggressive campaign against the LGBTQ community, and the two questions posed by it ultimately went unanswered.

Given the failure of the referendum, and the vacuum left as a result of Governmental inaction, the Supreme Court of Bermuda was called upon to clarify access for same-sex couples to legal rights and protections through marriage. The irony of the 5 May 2017 decision is that it was only rendered possible because the compromise that OUTBermuda advocated for prior to the referendum was so roundly and aggressively rejected.

OUTBermuda believes public support for marriage equality is increasing, as evidenced by our research which shows that those Bermudian voters under the age of 35 are more likely to be LGBTQ affirming than those over the age of 35. As that younger cohort increases as a proportion of the overall population, it will force change on a myriad of social issues, including



marriage equality. Be that as it may, we are where we are. OUTBermuda recognizes that the compromise it advocated for in 2016 is still in the best interest of all of Bermuda.

This is not to say that OUTBermuda believes the efforts of Messrs. Godwin and DeRoche were wasted. To the contrary, their bravery and dedication to the pursuit of equality is to be revered. They undertook a difficult task, which exposed them to public hostility and scorn. Our recommendation is that they should be formally honored as National Heroes.

Following our review of the proposed legislation OUTBermuda makes the following observations. For avoidance of doubt, our efforts to engage constructively with the Government in relation to the draft Bill should not be taken as a renouncement of our belief in marriage equality. While OUTBermuda is mandated to work on a number of important LGBTQ initiatives, our community will continue to strive for marriage equality and we will continue to support that cause.

#### ***Observations on specific clauses in the Bill***

*The Preamble* - The preamble to the Bill makes clear that the domestic partnership regime will be open to all adult couples, regardless of sexual orientation. OUTBermuda agrees with the policy of inclusion which underlies the proposed framework.

*Clause 4, Age of eligibility* - The ages of eligibility for marriage and domestic partnership are unequal, in that heterosexual couples may marry if they are under the age of 18 (with consent of their parents or guardians), whereas gay and lesbian couples, or heterosexual couples who prefer domestic partnership to marriage, must be at least 18 years old. The basis for the difference appears to us to arise from the requirement for gay men to be 18 to be able to consent to sexual relations. Three issues arise:

- (1) The draft Bill highlights the discriminatory nature of Bermuda's unequal age of consent laws, which position we find to be untenable, and should be addressed.
- (2) The draft Bill highlights the unintended consequences that can result from discrimination, in that although heterosexuals and lesbians do not face the same criminal sanctions as gay men when it comes to sexual relations, they are nonetheless disadvantaged by the proposed legislation merely because of an inequitable and biased provision contained in the Criminal Code Act 1907.
- (3) Given consummation is not a precondition to a domestic partnership there may be circumstances in which a couple under the age of 18 choose to have a domestic partnership in circumstances in which the desire for sexual relations is not an immediate priority; for example, where one of a couple has a terminal illness and the couple desires to formalize their relationship before the ill partner dies. OUTBermuda believes some allowance ought to be made in the legislation for such a scenario.



*Clause 5, Requirement not to be already married or in a domestic partnership; Clause 18, Grounds on which domestic partnership is void; Clause 36, Meaning of “overseas relationship”; Clause 55, Saving for certain same sex marriages* - It is unclear how the draft Bill will treat same-sex couples who married outside Bermuda prior to 5 May 2017. The draft Bill suggests that overseas marriages prior to 5 May 2017 will only be recognized insofar as they will become domestic partnerships from the commencement date of the Act. We would welcome clarity from the Ministry on the legal position in this regard.

There are two scenarios that we are aware of that raise questions:

1. A Bermudian, or Bermudian couple, domiciled overseas at the time of their overseas marriage prior to 5 May 2017, and
2. A Bermudian, or Bermudian couple, domiciled in Bermuda at the time of their overseas marriage prior to 5 May 2017.

Our understanding is that in relation to 1, above, those individuals will be treated as married as a matter of international law going forward, notwithstanding the Bill. We would welcome confirmation from you that this will indeed be the position.

We are unsure of the answer to 2, above, and welcome clarity on the point. This scenario not only touches upon issues of dignity, but also has the potential to adversely affect couples where length of marriage is relevant to the accrual of rights (as regards Bermudian status for the non-Bermudian spouse, for example).

If the legal position is that overseas marriages are void where they were entered into by a Bermudian, or a Bermudian couple, prior to 5 May 2017 and in circumstances in which that Bermudian, or Bermudian couple, was domiciled in Bermuda at that relevant time, OUTBermuda’s recommendation is that the Bill be amended to legally recognize the marital commitment of those individuals nonetheless. We believe this can be accomplished in one of two ways:

1. All overseas marriages entered into by same-sex couples prior to 5 May 2017 should be recognized as marriages retroactively; or alternatively,
2. The proposed transitional period should be extended beyond the commencement date for a period of (say) 12 months to allow those couples who have an overseas marriage (which is not recognized) the opportunity to convert that overseas marriage into a Bermuda one in view of the *Godwin* decision.

*Clause 19(d), domestic partnership voidable because of pregnancy by someone other than the petitioner* - This provision is both antiquated and sexist. OUTBermuda understands this was taken from existing marriage legislation; however, it applies unequally to women and men, and should be removed.



*Clause 41, omission of adultery as a basis of dissolution* - The draft Bill omits adultery as a basis for dissolving a domestic partnership. OUTBermuda understands this is in keeping with the modern approach to drafting marriage legislation. We should be grateful if you would confirm this to be the case. For now, we flag this issue because we do not want the Bill to give the impression that those entering into domestic partnerships are more likely to engage in infidelitous activity.

*Clause 48(2), application of the Human Rights Act 1981* – The draft Bill seeks to give primacy to the Matrimonial Causes Act 1974 over the Human Rights Act 1981. OUTBermuda believes the clause is superfluous if the draft Bill does indeed achieve the aim of complying with the requirements set out by European Court of Human Rights regarding the provision of a legal framework that recognizes same-sex relationships. In our view, the Human Rights Act 1981 should not be tampered with out of political expediency, and the Government should be obliged to establish a rational basis for granting any legislation primacy over any constitutional or quasi-constitutional statute, such as the 1981 Act. Appeasement of a segment of the community that is opposed to marriage equality in the face of this draft Bill, if indeed the Bill achieves that which it is intended to achieve, is incapable of satisfying that obligation.

### ***International Implications of the draft Bill***

It is unclear from the Bill whether domestic partnerships will be recognized outside Bermuda, and if so whether they will be afforded the same status of a Bermuda marriage. While the focus of the draft Bill may be to create a local framework of rights for same-sex couples, and although the immediate priority may not have been to identify how domestic partnerships are to be treated as a matter of foreign law, uncertainty in this regard is problematic. Marriage equality, which is the status quo, affords a level of certainty in relation to recognition of a relationship outside Bermuda that is not clearly provided by domestic partnership.

For a compromise to be workable, the Government should be in a position to give assurances as to how domestic partnerships are to be treated outside Bermuda. If this cannot be achieved in the near term, OUTBermuda's recommendation is that the transitional period be enlarged such that Bermuda domestic partnerships are treated as Bermuda marriages until such time that there is certainty that the domestic partnerships will be honored outside Bermuda in the jurisdictions that recognize marriage equality.

Thank you for considering this submission.

Yours sincerely,

OUTBermuda