Submissions to the Immigration Working Group and to the Government of Bermuda in respect of “Pathways to Status”

by

members of the Facebook Group “We Support Pathways to Status”

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Bermuda

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Introduction

The individuals behind the "We Support Pathways" group are pleased to have this opportunity to present our position to the Immigration Working Group looking into immigration reform and to the Government of Bermuda. While we are certainly disappointed that the legislation was not enacted in March, we nonetheless see this as an opportunity to improve upon Government's proposed amendments to the Bermuda Immigration and Protection Act 1956 ('BIPA') and to hopefully draw more community buy-in to the need for reform.

Currently, one of the only ways that a non Bermudian can attain Bermuda Status is by marrying a Bermudian. Some of the criteria that must be met include that the non-Bermudian must have been married to a Bermudian for 10 years, that spouse possessing such status throughout that period, must have been ordinarily resident in Bermuda for 7 years and be of good character and conduct. We believe that it is simply wrong for the law to make no other pathway available. Clearly, a person's right to private and family life under Article 8 of the European Convention of Human Rights is engaged when there is no possibility of a pathway in law. We certainly recognize that European caselaw affords member status a margin of appreciation as to how it gives effect to pathways to citizenship and/or status, but it must be recognized that an absence of any pathway (however defined) represents a defect in the law. We are thankful that Government recognizes this and that many stakeholders, including some critics of Pathways, recognize this as well.

Our primary motivation is drafting this position paper is concern about (1) persons who are born in Bermuda or who arrived here at a very young age and who know no other home other than Bermuda, such that they are effectively (even if not technically) stateless, and (2) maintaining the integrity of mixed-status families.

We note from the Premier's letter dated 17 March the following three envisaged stages of reform:

1. Child and family pathways;
2. 15 year pathway to PRC; and
3. 20 year pathway to Status.

Our concern about persons born in Bermuda, who arrived at a young age, or who are in mixed-status families, roughly corresponds to the Premier's stage 1, with some overlap in stage 3.

In respect of persons born in Bermuda or who arrived here at a young age, we found during the course of discussion on 'Pathways' many critics were quick to point out these individuals are not 'stateless' as a matter of international law; many, for example, are entitled passports through their parents or their grandparents. While technically true, with respect, this line of argument misses the mark. We are asking people to have compassion for individuals born in Bermuda or who were brought here from a very young age, through no fault of their own and who know no other home but Bermuda. We know of many individuals who were born in Bermuda after 1989 who (1) are not entitled to status, (2) are not entitled to a PRC and (3) are not entitled to any kind of long-term residential or employment security in Bermuda. These are individuals who do not know their parents' ancestral lands, some of whom have never visited those places or even know their ancestral languages. Some have never even left Bermuda. They went to Bermuda schools and have Bermuda friends. They are so thoroughly Bermudian in all but name.

It may be very easy to fault their parents for making a decision to come to Bermuda seeking economic opportunity and not having the foresight to provide for their children's long-term future. However, the

response should not be 'tough luck, their parents should have known better'; this would be the equivalent of visiting the sins of the parents onto the children. Bermuda, as a progressive jurisdiction should avoid enshrining this sentiment into law. The Bermudian thing to do is to have compassion and give a 'pathway' to status – not a birth right, mind you, but an opportunity to make various applications upon turning 18.

In summary – these persons might not be stateless *de jure*, they are stateless *de facto*.

All of this does not mean that we are unsympathetic to Government's desire to increase Bermuda's residential population in response to the very serious economic challenges facing Bermuda today. We understand and appreciate the demographic challenges facing Bermuda; we understand the desire to put in place an incentive structure that attracts the best and the brightest to Bermuda's shores; we understand the argument that long-term security would correspond with a non-Bermudian's willingness to invest in Bermuda's local economy. We understand and empathize with those arguments and accept them as a reason to act.

However, the plight of children and mixed-status families must come first in any reform to Bermuda's immigration laws. While important, the need to address people who have been in Bermuda for a considerable period of time is secondary. Accordingly, any legislative solution that ignores the first limb and addresses the second would, in our humble opinion, represent a failure.

The practical effect of this is our opinion that reform in the first limb is fundamental, and our expectation for legislative change is high. While the second limb is important, we believe that, if there is scope for compromise in respect of Government's position, this is where we would expect to see it. However, we are not inviting Government to compromise on this second limb; we are simply saying that many Bermudians and non-Bermudians can more readily accept a need to move here than in respect of children and mixed-status families. The policy reasons for liberalizing Bermuda's Pathways, as articulated by the Minister and his team, remain compelling.

Response to criticisms of 'Pathways'

We would like to take this opportunity to address a number of statements which have been made in recent weeks about immigration law in general and 'Pathways' to status in particular.

First, one of the pervasive themes which underpin the criticism is an effort to conflate electoral policy with immigration policy. In the past, Commonwealth citizens who lived in Bermuda for three years or more were entitled to vote in Bermuda's parliamentary elections without being Bermudian and irrespective of their immigration status in Bermuda. While it may be argued that this was the hangover of empire, it was wrong, and this was recognized when Bermuda's constitution was amended in 1979.

This is not what Government proposed. "Pathways" proposed to make a person eligible for a PRC after 15 years of living in Bermuda. This process presupposes that a non-Bermudian applicant successfully had his or her work permit renewed during many successive applications with the Department of Immigration. It bears repeating that many of these older individuals would have had their permits granted by the UBP and renewed by the PLP and the OBA; if there's an argument as to who should be in Bermuda, it is certainly these individuals.

After 15 years, a person becomes eligible to apply for PRC; it is not automatically granted, in contrast to an application by a Commonwealth citizen to register to vote in the 1960s and 1970s. Before the applicant is able to obtain full civic and political rights, he or she would have to wait a further 5 years and then apply for Bermudian status.

A 3 year entitlement for Commonwealth citizens versus a 20 year waiting period before eligibility and a non-guaranteed application across the board: is it really fair to compare or equate the two? We believe not.

Second, another criticism which is leveled is less explicit. CURB, for example, is very quick to point out that only 32 countries in the world offer birthright citizenship. With the greatest of respect, this fact is completely irrelevant because at no point has the Government proposed birthright citizenship. With the exception of adoption, every category of PRC or status proposed requires an applicant to be at least 18 years of age. This is to say nothing of the additional requirements which are superimposed.

This is a straw man argument and only serves to muddy the waters. The implication is that, if only 32 countries in the world offer birthright citizenship then Bermuda should not be so quick to depart from that international standard. However, as already stated, Bermuda is not proposing birthright citizenship. The sharing of this fact confuses the issue. It also an argument that appeals to a supposed international baseline standard. With respect, the better international baseline standard is the fact that nearly every country in the world offers a pathway based on length of residence in a jurisdiction. There may be some variation in terms of further requirements and / or waiting times, but the core principle of 'keeping your nose down and staying out of trouble' for a minimum period of time <u>IS</u> the international norm.

This is another logical leap that individuals such as MP Walton Brown have also made. In his now famous '10 points' following Minister Fahy's announcement, he states that the vast majority of countries have quotas for citizenship and nationality applications. This is factually incorrect. As with CURB's statements regarding birth right citizenship, it is an attempt to appeal to a supposed international norm which does not exist. If he and others were truly committed to following an international norm then they need to accept that (1) the overwhelming majority of countries <u>DO NOT</u> impose a quota requirement for citizenship or naturalization questions, and (2) where quotas are used, they tend to be used at permanent residency stage, and even here, we are talking about a minority of jurisdictions.

If critics want to invoke international standards to guide immigration policy, they have to stick to the facts and use the standards which are actually relevant. As it so happens, international baseline standards support Government's policy position.

Third, there is a further criticism which is related to the birthright citizenship one. This is an attempt to invoke international citizenship laws to (1) say that international human rights laws do not apply in respect of "pathways", and (2) support the absence of an international right to birthright citizenship. International law has a very important norm against statelessness, and it is correct to say that many non-Bermudians born in Bermuda have access to their ancestral citizenship and therefore there is no technical breach of this international law principle.

As a statement of legal principle, this is, of course, correct. However, it is irrelevant to "pathways". Our same arguments above in respect of birth right citizenship being an irrelevant straw man applies equally here. In addition, we would say this: The Government's legal arguments do not relate to international laws regarding the reduction of statelessness or to international conventions on nationality. Rather, they appear to be anchored on the European Convention of Human Right which applies to Bermuda and which has been the subject of judicial comment (the most recent example being the Bermuda Bred case). According to Minister Fahy's statements on 5 February 2016:

> *"Blanket bans on obtaining such residency rights , as is the case currently, are not consistent with the European Convention on Human Rights."*

The following legal analysis comes from the Government's PowerPoint presentation from the aborted public meeting to be held in Cathedral Hall. Based on our further legal research, we have no reason to disagree.

ECHR, Article 8 protects an individual's right to respect for private and family life. 'Private life' is engaged when a person is born in Bermuda or lives in Bermuda for their entire life. When a person is allowed to stay in a country for a long time, put down roots, make connections and networks, and establish their lives in Bermuda – his or her private life is directly engaged. Additionally, 'family life' is engaged where a person has direct familial connections in Bermuda. In either case, where there is no pathway to status, there is a potential breach of international human rights law.

ECHR, Protocol 1, Article 3 protects the right to free elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". Note that this refers to "all people". This precludes Bermuda from allowing a large group of residents to remain and live here without giving them a voice in how Government runs their affairs. This must be right; there is a certain theoretical perspective which says that non-Bermudians who pay taxes, pension contributions and insurance premiums, who work in Bermuda, and who use private and public services in Bermuda have a role to play within the social contract that binds the Government of Bermuda to the people. This does not mean that non-Bermudians should have the same rights as Bermudians from day 1; but it does mean that, where a person spends a long enough period of time in Bermuda and accordingly contributes to Bermudian society, he or she should have an opportunity to join the body politic, should they wish. 20 years living in Bermuda and being of good character is an appropriately tailored balance which gives effect to this right.

It is important to point out that member states have a certain margin of appreciation relating to immigration rights. This means that members such as Bermuda are given a lot of leeway when it comes to providing a pathway. They can be liberal or strict when it comes to accessing permanent residency or status. The European court won't be too concerned with how Bermuda gives effect to the right, just that

there is or isn't a right. The Court will also be concerned if the pathway is so long or has so many additional requirements superimposed that the right granted is meaningless. Government believes that it has settled the 'pathways' policies at a balance which is appropriate for Bermuda. At 10 years for family and young persons pathways, 15 years for PRC and 20 years for status, these pathways still place Bermuda at the far end of international baseline norms. This means that the policy makes an appropriate acknowledgement of Bermuda's reality as a small island with a small population.

(As an aside, no coherent argument has been made as to why Bermuda's size justifies significant departures from human rights obligations, especially when (1) nearly all individuals potentially benefiting are already in Bermuda, (2) their size is very small relative to the Bermudian population, and (3) up to 10,000 non-Bermudians have left these shores since the great recession of 2008.)

A variation of this theme is the criticism leveled by MP Walton Brown in respect of the distinction between British Overseas Territories Citizenship and Bermudian status and the implicit notion that international human rights applies to the former and not the latter. We believe that we have already addressed this in the context of the wrong focus of 'pathways' critics. However, we would only add, first, the ECHR applies to all residents of Bermuda, and second, the ECHR arguments are centered respectively on security for living and working in Bermuda and for access to the full civic and political rights. The distinction between BOTC and status is immaterial.

Fourth, MP Leah Scott has argued in favour of a staggered approach to immigration policy.[1] While we have some broader concerns, we won't address them here and instead direct readers to a column published by Bryant Trew on 8 April 2016 in the Royal Gazette[2]. One of the more important excerpts from her email is as follows:

> *1. The "right thing to do" really is no justification for Pathways to Status. In my opinion, our messaging should be:*
>
> > *1.1 There are anomalies within families that need to be corrected. Pathways will address that.*
> >
> > *1.2 There are people here who were born here, or have been here their entire life, who know no other home but Bermuda and have no other home to go to. Pathways will address that.*
> >
> > *1.3 The remaining PRC holders who fall outside of 1.1 and/or 1.2 should be granted status on a staggered basis. Yes – it is a quota – but can be done in a palatable way, and I have some ideas as to how it can be done.*

In a sense, MP Scott's position is not too dissimilar from what we propose in this paper. We too believe that there are anomalies within families that need to be corrected and that there are people here who were born here, or have been here their entire life, who know no other home but Bermuda and have no other home to go to.

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[1] http://bernews.com/2016/03/mp-leah-scott-you-need-to-reassess-this/

[2] http://www.royalgazette.com/bryant-trew/article/20160408/mr-famous-you-are-using-false-arguments-to-mislead-voters

We also agree with her implicit ranking; we too think that those falling within 1.1 and 1.2 represent a more urgent need than those falling within 1.3. While we do not agree with quotas for reasons which we will develop, we nonetheless accept the proposition that IF quotas are to be introduced, they should apply to long-term residents but not to those who fall in the "family" or "born in / arrived to Bermuda at a young age" categories.

But if there is one thing that we have learned from the Carne and Correia decision, there will inevitably be a staggered approach in any event. That decision was handed down in May 2014.We are just shy of the 24 month mark for that decision having been made. Here are the numbers:

- About 1,500 people were eligible for Bermudian status;
- About 800 have applied;
- About 280 have gotten their status so far.

This means that:

- 1 in 2 persons eligible to apply for status have actually made an application;
- 1 in 3 persons who have applied for status have actually applied for status have received their status;
- overall, less than 1 in 5 persons eligible to apply for Bermudian status have actually obtained their status within 2 years.

There are still individuals waiting on the results of their status application 2 years out, and others who will likely continue to wait. This is the natural turnaround time of the Department of Immigration poring through and forensically considering applications.

The conclusion here is that, even absent consideration of quotas, a 'staggered approach' will be inevitable.

In any event, as we will argue later on, if there has to be a more staggered approach, we would be in favour of tightening the 'Pathways' proposals in a manner which applies fairly and across the board as an alternative to quotas. For example, at one point we raise the possibility of raising the family / young person pathway from 10 to 12 years, the PRC pathway from 15 to 18 years and the status pathway from 20 to 21 years. This would achieve the policy objective of having a more staggered approach without introducing some of the unfairness arguments we touch upon.

Background to the Report

Before compiling this report, we reached out to the more than 5,000 signatories and supporters of our petition, and to the just shy of 2,500 members of our Facebook group.

We asked our supporters to provide us with feedback on the legislation: What parts do they agree with? What parts do think need to be changed? How can we generally improve the legislation so that it is responsive to the needs of Bermudians and long term residents?

The following were the lines of inquiry which we asked our supporters to consider when submitting their comments.

Relating to the Pathways proposals:

- Are the child and family provisions in the Bill sufficient?
- Are quotas acceptable? Under what circumstances would they be acceptable?
- Are the timelines laid down in the Bill acceptable?
    - 10 years to PRC – family and child provisions
    - 15 year to PRC – other long-term residents
    - 20 years to Bermudian status
- What scope should there be for moving from these timelines?
- What other pieces missing from the immigration legislation should be included?

Relating to the Work Permit proposals, which will run in parallel with the above, we would welcome comments on the following:

- Amendments to address a living wage and training requirements for Bermudians;
- Cracking down further on unscrupulous business tactics that undermine Bermudian labour;
- Working more with the International Business sector to provide summer job opportunities for Bermudians;
- Continuing with Government's efforts to similarly provide such summer job opportunities;
- Continued robust enforcement of Work Permit policies through; and
- Such other matters of mutual interest as may be agreed.

We ask everyone to email their comments to pathwaytostatusbermuda@gmail.com or to share their comments on Facebook. In turn we received close to 40 submissions.

This report is the direct result of this process.

1. The provisions allowing persons who were born in Bermuda or who arrived in Bermuda before their 6th birthday to apply for Bermudian status upon turning 18 should be revived.

In our opinion, this is the single most important reform that the Government should consider introducing. The absence of a revival of section 20A of BIPA represents the single biggest defect in Government's 'Pathways' proposal.

Section 20A says:

> ***Right of certain long-term residents to Bermudian status***
>
> *20A (1) A person may apply to the Minister under this section for the grant of Bermudian status if—*
>
> *(a) he was born in Bermuda or first arrived in Bermuda before his sixth birthday; and*
>
> *(b) he is a Commonwealth citizen of not less than eighteen years of age; and*
>
> *(c) he was ordinarily resident in Bermuda on 31 July 1989 and on the day of commencement of the Bermuda Immigration and Protection Amendment Act 1994; and*
>
> *(d) he has been ordinarily resident in Bermuda for the period of ten years immediately preceding his application; and*
>
> *(e) he makes his application on or before 31 July 2008.*
>
> *(2) Subsections (3) to (9) of section 19 shall have effect mutatismutandis in relation to applications under this section as those subsections have effect in relation to applications under section 19.*

Section 20A of BIPA allowed persons who were ordinarily resident in Bermuda on or before 31 July 1989 to apply for Bermuda status upon turning 18 if they were born in Bermuda or first arrived in Bermuda before their sixth birthday and if they were ordinarily resident in Bermuda for 10 years before their application.

The relevant explanatory note to the Bill states as follows:

> *"Clause 9 repeals section 20A (right of certain long-term residents to Bermudian status) as the section is spent. (Subsection (1)(e) requires an application for the grant of Bermudian status under that section to have been made on or before 31 July 2008.)"*

We are disappointed that clause 9 of the Bill would repeal this provision. We see no benefit to requiring a person born in Bermuda to apply for a PRC first and then to obtain Bermuda status at a later point in time.

This provision was in place from 1994 to 2008. It has worked well in the past and people (including immigration officials) are familiar with it.

The absence of such a pathway is where we see the most potential for international human rights violations.

For those who are not Commonwealth citizens, it is our understanding that, in the past, once a person was approved for the grant of Bermudian status, that person would be naturalized as a British Overseas Territories Citizen.

Accordingly, section 20A of BIPA should remain with subsections (1)(c) and (1)(e) deleted. This should be an ongoing pathway to status and under no circumstances should it be subject to a quota.

If section 20A were revived as part of the first tranche of reform, we feel there would be much scope for compromise and adjustment in respect of the more contentious provisions of the Bill. The vast majority of individuals who should be dealt with as a matter of urgency would stand to benefit by this change, thereby easing the humanitarian burden on these individuals.

For example, we could conceive of the following tweaks made in light of the foregoing:

- the 10 year PRC pathway for persons who arrived before their 16th birthday (and who would not qualify under a revived section 20A), could be lifted to 12 years,
- the 15 year PRC pathway to 18 years, and
- the 20 year status pathway to 21 years.

2. The children of Bermudians whose parents were not living in Bermuda at the time of their birth should be entitled to apply to register for Bermudian status by descent.

Several letters to the editor and comments made on radio programmes in recent months have alluded to a gap in Bermuda's legislation whereby persons born overseas to a Bermudian cannot obtain status unless one of their parents was domiciled in Bermuda at the time of their birth. This was seen as an additional pathway which the legislation should consider.

We agree. We believe that individuals should be able to obtain Bermudian status by descent. We recognize that one of the issues may have to do with obtaining Commonwealth citizenship. To that end, we would propose that such a provision be drafted to mimic the comparable provision in the British Nationality Act 1981.

> ***16 Acquisition by descent.***
>
> *(1) A person born outside the British overseas territories after commencement shall be a British overseas territories citizen if at the time of the birth his father or mother—*
>
> *(a) is such a citizen otherwise than by descent; or*

(b) is such a citizen and is serving outside the British overseas territories in service to which this paragraph applies, his or her recruitment for that service having taken place in a British overseas territory.

(2) Paragraph (b) of subsection (1) applies to—

(a) Crown service under the government of a British overseas territory; and

(b) service of any description for the time being designated under subsection (3).

(3) For the purposes of this section the Secretary of State may by order made by statutory instrument designate any description of service which he considers to be closely associated with the activities outside the British overseas territories of the government of any British overseas territory.

(4) Any order made under subsection (3) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

This could be conceivably redrafted as follows for Bermudian status:

Acquisition of Bermudian Status by descent

18A A person born outside Bermuda after commencement of this section shall possess Bermudian status if at the time of the birth, he is a Commonwealth citizen, and his father or mother—

(a) possesses Bermudian status otherwise than by virtue of this section; or

(b) possesses Bermudian status and is serving outside Bermuda in under the Government of Bermuda, his or her recruitment for that service having taken place in Bermuda.

Such a formulation would provide a new pathway to the child of a Bermudian born overseas, provided that the Bermudian parent possessed status at the time of the child's birth other than by descent. This formulation would also go no further than section 16 of the BNA, thus ensuring that such individuals could qualify for BOTC as well.

3. Anyone who is able to obtain Bermudian status regardless of which pathway is used should be able to register any minor children living with them in Bermuda as part of the same application process so that they too can obtain Bermudian status.

Section 16 "deems" any person who is under the age of 22 and is a child or stepchild adopted in a manner recognized by law, of a person who has Bermudian status to posses and enjoy Bermudian status.

One of the main problems with section 16 is that it does not take into consideration children or adopted children whose parents have/will attain Bermudian Status upon applying for, and receiving, the grant of Bermudian status. For example, if a person applies to obtain Bermudian status under the 20 year pathway, that individual may have children who are non-Bermudian.

Persons who obtain Bermudian status subsequent to the births of their children are unable to substantively pass on Bermudian status to said children. They will be deemed to be Bermudians by virtue of section 16(2) of BIPA and will be able to make a substantive application upon turning 18 under section 22.

However, the Government's concern in respect of the adopted children of a Bermudian applies with equal force. In his comments on 5 February, the Minister said that following in respect of the adopted children of Bermudians:

> *... such individuals were only deemed to be Bermudian until their 22nd birthday. They would then have to make an application for the grant of Bermuda Status when they turn 18 and would have to have ordinarily lived in Bermuda for five years before that application.*
>
> *However, this leaves such children vulnerable to losing their chance for Bermudian status if that five year residency period is interrupted.*

The same concerns arise in respect of the minor children of new Bermudians. The 5 year period of residence required to convert deemed Bermudian status to actual Bermudian status may be interrupted.

It seems very unfair for a person that falls into this 'deemed' category to state that they were once Bermudian but upon turning 22, this was revoked.

The explanatory note for Clause 5 of the Bill reads as follows:

> *"Clause 5 inserts section 18AA (acquisition of Bermudian status by adoption). Currently, under section 16(2), every child adopted (in a manner recognized by Bermudian law) by a person who has Bermudian status is "deemed" to possess Bermudian status. But, in order to acquire (actual) Bermudian status, that person must, after he reaches the age of 18, but before reaching 22, apply under section 20 to be granted Bermudian status. Section 18AA provides for automatic (actual) Bermudian status to be acquired in certain circumstances by a child who is legally adopted by a person with Bermudian status while the child is under the age of 12 years on the date of his adoption."*

To that end, we propose introducing a provision allowing the Minister to register children as Bermudians (actual status) upon their parents becoming Bermudian rather than having them rely on the deeming provision, thus bringing this process in line with the Government's amendment for adopted children.

In the UK, for example, this would happen by way of a joint 'family application'. Upon a non-UK person meeting the requirements for naturalization, that person's minor children could be registered as Bermudian at the same time as his or her parent(s).

As to how the process works in the UK, see Home Office Guide MN1 'Registration as a British citizen– A guide about the registration of children under 18', which can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483729/MN1_Guide_December_2015.pdf (page 12):

Registration at the Home Secretary's discretion – Section 3(1) application

Children born abroad to parents who are applying for British citizenship

Where one or both parents are applying for British citizenship they may apply for one or more children who are not automatically British at birth (see "Automatic acquisition of British citizenship" above) to be registered as British citizens as part of a "family application". Children in this category will be considered at the Home Secretary's discretion and will usually be registered only if both the parents are granted or already hold British citizenship, or if one parent holds British citizenship and the other is settled in the UK.

In order to address the requirement for Commonwealth citizenship, we note that section 17(1) of the BNA provides as follows (which is drafted in similar terms to :

17 Acquisition by registration: minors.

(1) If while a person is a minor an application is made for his registration as a British overseas territories citizen the Secretary of State may, if the thinks fit, cause him to be registered as such a citizen.

The provision is drafted as a broad discretion on the part of the Secretary of State. In practice, it is not dependent on the parent being a BOTC. But the discretion can either be constrained in legislation or it can be supplemented by a policy relating to a parental application.

The benefit of a broad discretion to grant status is to allow the Minister to address humanitarian situations, such as where a person is born in Bermuda stateless. However, in practice, it would have to be exercised in similar circumstances as the power under the BNA would be exercised to ensure that we do not have situations where a person obtains Bermudian status but is not a Commonwealth citizen.

Accordingly, we believe that a similar provision should be adopted into Bermuda law allowing the Minister to register a minor as a Bermudian, provided that he or she is also a Commonwealth citizen. It might be that the age threshold should be equalized to that of an adopted child, though our recommendation would be to keep it at 18 so that the Minister is given sufficient discretionary power to assist persons in genuine humanitarian need.

A new provision could like the following:

Acquisition of Bermudian Status by registration: minors.

18B If while a person is under the age of 18 [or 12] and a Commonwealth citizen an application is made for his registration as a person possessing Bermudian status, the Minister may, if he thinks fit, cause him to be so registered.

4. The Bill would allow the adopted under-12 children of Bermudians to automatically obtain Bermudian status. This threshold appears to be out of step with British naturalization laws which allow for the under-18 children of citizens to obtain British Citizenship or British Overseas Territories Citizenship. We would recommend that Government consider raising this threshold.

The proposal to allow the adopted children of Bermudians to acquire Bermudian status automatically is a welcome development. We note that it is limited to persons adopted under the age of 12.

This would be effected by new section 18AA, to be inserted by clause 5 of the Bill:

> ***Acquisition of Bermudian status by adoption***
>
> *18AA (1) Where, on or after commencement of this section, a person not possessing Bermudian status who, on the date of his adoption, is both a Commonwealth citizen and under the age of 12 years—*
>
> *(a) is adopted in Bermuda under the Adoption of Children Act 2006 and, on the date of his adoption, one of his adoptive parents possesses Bermudian status; or*
>
> *(b) is adopted outside Bermuda, under the law of an approved jurisdiction, and where—*
>
> *(i) on the date of his adoption, one of his adoptive parents possesses Bermudian status and that parent is (on the date of the adoption) domiciled in Bermuda; and*
>
> *(ii) his overseas adoption is recognized by the law of Bermuda,*
>
> *he shall possess Bermudian status from (and inclusive of) the date of his adoption.*
>
> *(2) Where, before commencement of this section, a person not possessing Bermudian status who, on the date of his adoption, was both a Commonwealth citizen and under the age of 12 years—*
>
> *(a) was adopted in Bermuda under the Adoption of Children Act 1963 or the Adoption of Children Act 2006, and where—*
>
> *(i) on the date of his adoption, one of his adoptive parents possessed Bermudian status; and*
>
> *(ii) on commencement of this section, he is under the age of 18 years; or*
>
> *(b) was adopted outside Bermuda, under the law of an approved jurisdiction, and where—*
>
> *(i) on the date of his adoption, one of his adoptive parents possessed Bermudian status and that parent was (on the date of the adoption) domiciled in Bermuda; and*
>
> *(ii) on commencement of this section, he is under the age of 18 years and his overseas adoption is recognized by the law of Bermuda,*
>
> *he shall possess Bermudian status from (and inclusive of) the date of commencement of this section.*
>
> *(3) In this section—*

(a) "a person not possessing Bermudian status" includes a person who, by virtue of section 16(2), is only deemed to possess Bermudian status;

(b) "approved jurisdiction" has the meaning given in section 46 of the Adoption of Children Act 2006; and

(c) "commencement of this section" means the date on which the Bermuda Immigration and Protection Amendment Act 2016 comes into operation.

(4) For the avoidance of doubt, if a person becomes a British overseas territories citizen by virtue of section 15(5) or 15(5A) of the British Nationality Act 1981 (UK) from the date that his adoption is effected, he shall be taken for the purposes of this section to be a Commonwealth citizen on the day the adoption is effected.

(5) Subsections (8) and (9) of section 18 shall have effect, mutatis mutundis, in construing the domicile of the adoptive parents under this section.".

We also note that sections 1(5) (British Citizenship by adoption) and 15(4) (BOTC by adoption) of the BNA allow for the acquisition of citizenship by any minor who is adopted, that is, a person under the age of 18.

We are unsure as to why the Bermudian proposal departs from pre-existing British law on citizenship. It is conceivable that a non-Bermudian child adopted in Bermuda by a Bermudian parent could find him or herself in one of the following situations:

- If 11 years old or under, acquiring BOTC automatically and Bermudian status automatically;
- if 12 years old or over, but under 18, acquiring BOTC automatically but not Bermudian status (though he or she would be deemed to be Bermudian until 22).

The only justification we can see for maintaining a lower threshold for adoption cases is that the adoption process could be seen as a way to allow older individuals to enter into 'adoptions of convenience' in order to obtain Bermudian status so that a cousin or niece or nephew in a foreign country can be brought into Bermuda to work.

In response, we would say that (1) we're not sure if this is really a prevalent mischief, and (2) such individuals can already be adopted under the age of 18, be naturalized as BOTCs and be deemed to belong to Bermuda pursuant to the Williams and Barbosa court cases, and accordingly, be allowed to work free of work permit control.

We think that it might be seen as fairer to increase the age to 18 especially if our recommendation in respect of registering minor children were adopted (see above) to ensure consistent practice across the board.

5. The 10 year PRC pathway for young persons arriving in Bermuda should largely remain as proposed in the original Bill

New section 31AA(b), to be inserted by clause 14 of the Bill, would allow persons born in Bermuda or who arrived in Bermuda before their 16th birthday to apply for a PRC after 10 years of residency.

> ***Right of certain long-term residents to permanent resident's certificate***
>
> *31AA (1) Subject to the provisions of this section, a person may apply to the Minister for the grant of a permanent resident's certificate if—*
>
> *(b) he—*
>
> *(i) was born in Bermuda or first became ordinarily resident in Bermuda before his sixteenth birthday;*
>
> *(ii) has been ordinarily resident in Bermuda for a period of 10 years;*
>
> *(ii) was ordinarily resident in Bermuda for the period of two years immediately preceding the application; and*
>
> *(iv) is not less than 18 years of age.*

The relevant explanatory note to the Bill states as follows:

> *"Clause 14 inserts section 31AA (right of certain long-term residents to permanent resident's certificate). Subsection (1) ... further provides that, if the person was born in Bermuda or first became ordinarily resident in Bermuda before his sixteenth birthday, he may so apply if he has been ordinarily resident in Bermuda for a period of 10 years, was ordinarily resident in Bermuda for the period of two years immediately preceding the application, and is not less than 18 years of age. The newly inserted provisions of section 19 apply, with necessary modifications, to applications made under this section."*

We believe that the provisions as drafted should largely remain. Even though we have recommended that persons born in Bermuda or who arrived before their 6th birthday be allowed to apply for Bermudian status upon turning 18, we still feel that this provision has a role to play. Minor children do not have any say in where their parents and guardians take them. Persons who arrive in Bermuda on or after their 6th birthday but before their 16th birthday probably have more linguistic and cultural attachments than younger children to their ancestral homelands, thus justifying more stringent requirements (ie only PRC after 10 years and Bermudian status after 20 years of residence), but some allowance must be made for setting down some roots in Bermuda.

We believe that quotas would not be appropriate in this young person-based category. If there were concern that this pathway were too liberal, then we would prefer to see the requirements for PRC made more stringent across the board instead of quotas.

In the first instance, we believe that the length of time, as drafted, is fine. If this is not agreed, we would suggest perhaps raising the length of time required to 12 years of residence.

6. The 10 year PRC pathway for close family connections should largely remain as proposed in the original Bill subject to inclusion of the possibility that close family members of 31B PRCs may apply for PRC in their own right

Section 31B, to be amended by clause 15 of the Bill, would allow persons with a close family connection to Bermudians or PRCs to apply for a PRC after 10 years of residency.

As amended, section 31B would provide as follows:

> ***Right of certain other persons to permanent resident's certificate***
>
> *31B (1) Subject to the provisions of this section, a person referred to in subsection (2) may apply to the Minister under this section for the grant of a permanent resident's certificate if—*
>
> *(a) he is at least eighteen years of age; and*
>
> *(b) he has been ordinarily resident in Bermuda for a period of ten years immediately preceding the application. ~~; and~~*
>
> *~~(c) subject to subsection (6), he makes his application before 1 August 2010.~~*
>
> *(2) The person referred to in subsection (1) is—*
>
> *(a) the brother or sister of a person who possesses Bermudian status where that brother or sister does not qualify for such grant;*
>
> *(b) the natural parent of a person who possesses Bermudian status where that parent does not qualify for such grant;*
>
> *(c) the brother or sister of a person who has been granted a permanent resident's certificate ~~under section 31A~~ (which was granted other than under this section) where that brother or sister does not otherwise qualify for such grant;*
>
> *(d) the natural parent of a person who has been granted a permanent resident's certificate ~~under section 31A~~ (which was granted other than under this section) where that natural parent does not otherwise qualify for such grant;*
>
> *(e) the son or daughter of a person who has been granted a permanent resident's certificate ~~under section 31A~~ (which was granted other than under this section) where that son or daughter is above the upper limit of compulsory school age; or*
>
> *(f) the spouse of a person who has been granted a permanent resident's certificate ~~under section 31A~~ (which was granted other than under this section) where that spouse does not qualify for such grant or for the grant of Bermudian status.*
>
> *(3) For the purposes of subsection (1)(b), in the case of a person referred to in paragraph (a), (c), (e) or (f) of subsection (2), ordinary residence shall be calculated from the moment the relationship of brother or sister, son or daughter, or spouse, is established under paragraph (a), (c), (e) or (f) as the case may be.*

(4) Subsections (3) to (3E) and (4) to (9) of Section 19 shall, mutatis mutandis, apply to a person making application for a permanent resident's certificate under this section as it applies to a person making application for Bermudian status under that section.

~~*(5) For the purposes of subsection (1)(b), section 20C (3) to (7) shall, mutatis mutandis, apply to a person making application for a permanent resident's certificate under this section as they apply to a person making application for Bermudian status under section 20C.*~~

~~*(6) Subsection (1)(c) does not apply to a person referred to in subsection (2)(e) or (f).*~~

[(7) and (8) deleted]

(9) In subsection (2)(e) "compulsory school age" has the meaning assigned to that expression by section 40 of the Education Act 1996.

(10) Except as provided in this section, nothing contained in this section shall be construed as conferring on a person who is related to another person who has been granted a permanent resident's certificate under this section any right to apply for, or be granted, such a certificate.

The relevant explanatory note to the Bill states as follows:

"Clause 15 amends section 31B (right of certain other persons to permanent resident's certificate) by repealing subsection (1)(c), thereby reviving certain provisions. The repealed subsection provides that an application for a permanent resident's certificate under the section cannot, subject to subsection (6), be made on or after 1 August 2010. Subsection (6) provides that subsection (1)(c) does not apply to a person referred to in subsection (2)(e) or (f), i.e. a son or a daughter who is above the upper limit of compulsory school age, or the spouse, of a person who has been granted a permanent resident's certificate (which was granted other than under section 31B). The effect of the amendment is therefore that the other categories of family member or persons with Bermudian status or permanent residence, listed in subsection (2), may again apply for permanent residence under this section if they are at least 18 years of age and have been ordinarily resident in Bermuda for a period of 10 years immediately preceding the application. Section 31B is further amended by repealing the current subsection (5) (which applies, with necessary modifications, the current sections 20C(3) to (7)), and by amending subsection (4) to apply, with necessary modifications, the newly inserted provisions of section 19."

Our primary concern is that clause 15 would retain the same problem we have now where persons who obtain their PRC under section 31B are unable to pass on their PRC to spouses and children. We believe that all PRCs should be able to allow close family members to make an application for a PRC. To that end, we would ask that the words "and substituting "(which was granted other than under this section)"" from clause 15(b) of the Bill be struck. Other than this amendment, we believe that the provisions as drafted should largely remain.

We believe that quotas would not be appropriate in this family-based category. If there were concern that this pathway were too liberal, then we would prefer to see the requirements for PRC made more stringent across the board instead of quotas.

In the first instance, we believe that the length of time, as drafted, is fine. If this is not agreed, we would suggest perhaps raising the length of time required to 12 years of residence.

As a supplemental reform, if our recommendation in respect of 'Bermudian status by decent' were not adopted (see above), we think that there might be value in introducing a pathway to PRC for the children of Bermudians who might not otherwise qualify for status or PRC. It is only fair that a Bermudian be given the opportunity to 'pass' on some form of security to his or her child if a PRC can as well.

To that end, we think a new paragraph in subsection (2) should be inserted:

> *(ba) the son or daughter of a person who possesses Bermudian status where that son or daughter is above the upper limit of compulsory school age and does not otherwise qualify for Bermudian status or a permanent resident's certificate;*

7. The 15 year PRC pathway should largely remain as proposed in the original Bill; however, we also recognize that there may be scope for adjustment in this respect.

New section 31AA(a), to be inserted by clause 14 of the Bill, would allow long-term residents of Bermuda to apply for a PRC after 15 years of residency.

Section 31AA, as inserted, would provide as follows:

> ***Right of certain long-term residents to permanent resident's certificate***
>
> *31AA (1) Subject to the provisions of this section, a person may apply to the Minister for the grant of a permanent resident's certificate if—*
>
> *(a) he—*
>
> *(i) has been ordinarily resident in Bermuda for a period of 15 years; and*
>
> *(ii) was ordinarily resident in Bermuda for the period of two years immediately preceding the application;*

The relevant explanatory note to the Bill states as follows:

> *"Clause 14 inserts section 31AA (right of certain long-term residents to permanent resident's certificate). Subsection (1) provides that a person may apply to the Minister for the grant of a permanent resident's certificate if he has been ordinarily resident in Bermuda for a period of 20 years and was ordinarily resident in Bermuda for the period of two years immediately preceding*

the application.... The newly inserted provisions of section 19 apply, with necessary modifications, to applications made under this section."

We believe that the provisions as drafted should largely remain.

We believe that quotas are never appropriate. They are unfair and arbitrary and can lead to inconsistent results. Accordingly, they might open the Government in future to claims for judicial review.

Furthermore, as is clear from the research provided by the Bermuda Government, quotas are the exception rather than the norm globally, even in small jurisdictions. For example, of the British Overseas Territories and Crown Dependencies, only the British Virgin Islands uses a quota. This example was much cited by critics of Pathways in recent months. However, there are some important qualifications in respect of the BVI example:

- The quota applies to their equivalent of permanent residency NOT Bermuda status;
- The Complaint Commissioner (equivalent to Bermuda's Ombudsman) has made a finding that the policy settled in 2004 that there be a minimum requirement of 20 years and that only 25 residential certificates be issued a year was unlawful – see http://bvinews.com/new/unlawful-govt-accused-of-breaking-the-law-regarding-permanent-residence/; and
- As already noted, BVI is an outlier in using quotas.

These qualifications reinforce our concerns that a quota system might not withstand judicial scrutiny in future. In any event, we feel that a quota system is simply not needed given the likely numbers of persons likely to apply and qualify for a PRC as released by Government.

In addition, there are some hypothetical situations that lead us to worry about the effects of a quota-based system:

(1) If the legislation says that the Minister may only grant a certain number of certificates a year, it seems that a mischievous Minister could abuse this by holding up the grant of certificates until he or she has a large pool to choose from, thus effectively reintroducing discretionary grants through the back door.

(2) If the legislation set up a quota at, say, 50 per year on a first come first basis, what happens if the 49, 50 & 51 are a family unit applying together; we would return to our concerns about dividing families.

(3) A legislative quota would almost certainly lead to a large backlog of applications not being processed in a timely manner, and this would have the effect of introducing a further degree of uncertainty into the lives of non-Bermudians.

(4) A backlog of applications may also lead to the possibility of an applicant waiting a number of years before a decision is made, and that person's permission to remain in Bermuda could be revoked before an application is finalized. We see this as open to all sorts of abuses. The legislation would have to consider the possibility of allowing applicants to submit something akin to Canada's 'Open Work Permit'

In addition, if the legislation were to superimpose requirements for future applicants, similar to the Cayman points system, we would have concerns about potential discrimination. For example, if the

legislation were to prefer persons with a particular level of education or from certain job classes, we would be concerned about an immigration policy that favours a particular demographic profile.

However, we also recognize that this might be the most contentious proposal in 'Pathways'. If compromise was sought in respect of any pathway, this would be it. Our preference would be for more stringent requirements applied across the board rather than the use of a quota.

Our proposals in respect of this Pathway would be as follows (in our order of preference):

(1) Maintain this Pathway at 15 years;

(2) Raise this Pathway to 18 years; and

(3) Abolish this Pathway altogether, provided that persons can apply for Bermudian status at 20 years without requiring a PRC and that children or persons arriving in Bermuda before their 6th birthday can apply for Bermudian status upon turning 18.

While we advocate abolishing the Pathway as a last resort, we feel our proposed complementary reforms would lessen the urgency somewhat for action in this front.

8. Any application process for a pathway should be paired with a parallel right to live and work in Bermuda while the application remains outstanding.

We have alluded already in our introductory sections to the long processing times for PRC and status applications by the Department of Immigration. If an individual on a work permit submits an application for a PRC (or for Bermudian status, if our recommendation to abolish requiring a PRC as a prerequisite is accepted – see below), there could be a considerable period of time which elapses before he or she receives a decision. This is a particularly acute concern given the processing times for status applications post-Carne and Correia. There is a risk that a work permit could expire during that period of time, thus jeopardizing the PRC application.

Canada addresses this situation as follows: if a person submits an application for permanent residency, he or she can ask for what is called an 'Open Permit' from Citizenship and Immigration Canada. This permit allows an applicant to live and work in Canada until the application for permanent residency is decided. If it is in the applicant's favour, the Open Permit falls away. But if not in the applicant's favour, the decision is communicated to the applicant and advises that the Open Permit also comes to an end; if a separate application for a work permit is not made and accepted, the individual would have to settle their affairs and leave Canada. This is important because Canada has applications which can take many months or years to be processed.

It appears that Bermuda is heading in the direction of Canada and other jurisdictions in terms of the length of time it may take for a PRC or Status application to be made. We believe that the law or work permit policy should be amended; where a person is subject to immigration control and makes an application for a PRC (or for Bermudian status, if our recommendation to abolish requiring a PRC as a prerequisite is accepted – see below), he or she should be able to continue to live and work in Bermuda until a decision is made on the substantive application. This will ensure that an individual's work permit

is not used as a tool to remove what would otherwise be that individual's entitlement to a PRC or Bermudian status.

This could be achieved by adopting the concept of the 'Open work permit' which is used in Canada. If an applicant is on a work permit, that applicant should be given permission to reside in Bermuda and to work in Bermuda pending the outcome of his or her application. In practice, this would require the terms of the permit to continue. For example, that applicant would be expected to continue to be subject to any employment restrictions in the permit. Furthermore, working illegally or otherwise being in receipt of a work permit penalty would jeopardize not just the work permit but also the PRC / Status application. However, if the applicant's employer receives a work permit penalty, this should not affect the individual's application directly.

In our opinion, such a measure may make the possibility of a staggered approach (ie quotas) more acceptable to the broader community. However, we emphasize: (1) quotas should never apply to family and born in Bermuda / young persons pathways, and (2) our preference is for more stringent requirements across the board to be accepted instead of quotas (eg raising the time thresholds).

9. The 20 year Status pathway should largely remain as proposed in the original Bill but the precondition of possessing a PRC should be removed; however, we also recognize that there may be scope for adjustment in this respect.

New section 20BA, to be inserted by clause 10 of the Bill, provides as follows:

> ***Right of certain long-term residents to Bermudian status***
>
> *20BA (1) A person may apply to the Minister under this section for the grant of Bermudian status if—*
>
> *(a) he is a Commonwealth citizen;*
>
> *(b) he has been ordinarily resident in Bermuda for the period of 20 years immediately preceding his application; and*
>
> *(c) subject to subsection (2), he is a permanent resident.*
>
> *(2) Subsection (1)(c) (the requirement that he be a permanent resident) does not apply to an applicant who on the date that the Bermuda Immigration and Protection Amendment Act 2016 comes into operation has been ordinarily resident in Bermuda for the period of 20 years immediately preceding that date.*
>
> *(3) An applicant referred to in subsection (2) who—*
>
> *(a) on the date that the Bermuda Immigration and Protection Amendment Act 2016 comes into operation is not a Commonwealth citizen; and*
>
> *(b) not before 18 months before his application under this section, applied for (and paid the fee prescribed under the Government Fees Act 1965 in respect of) a permanent resident's certificate,*

shall, in respect of the application under this section, be entitled to a reduction in the fee prescribed under the Government Fees Act 1965 by the amount he paid in respect of the application for his permanent resident's certificate.

(4) Subsections (3) to (3E) and (4) to (9) of section 19 shall have effect, mutatis mutandis, in relation to applications under this section as those provisions have effect in relation to applications under section 19.

The relevant explanatory note to the Bill states as follows:

"Clause 10 inserts section 20BA (right of certain long-term residents to Bermudian status). Subsection (1) provides that a person may apply to the Minister under this section for the grant of Bermudian status if: (a) he is a Commonwealth citizen; (b) he has been ordinarily resident in Bermuda for the period of 20 years immediately preceding his application; and (c) he is a permanent resident. But the requirement that he must be a permanent resident does not apply to an applicant who has already been resident in Bermuda for the period of 20 years immediately before this Act comes into operation. Subsection (4) applies subsections (3) to (9) of section 19 (inclusive of the newly inserted provisions), with necessary modifications, to applications under this section."

We believe that the provisions as drafted should largely remain.

First and foremost, some have suggested that there should be a quota for the grant of Bermuda status. This we cannot support. We believe that quotas are never appropriate. They are unfair and arbitrary and can lead to inconsistent results. Accordingly, they might open the Government in future to claims for judicial review.

Furthermore, we are not away of any country or jurisdiction that employs a quota system for citizenship, status or other analogous concept. Where quotas are used, they arise in respect of permanent residency. This seems intuitively right – if a country is going to subject a person to rigourous selection, it should be at the first stage, when graduating from non-Bermudian to PRC and not when graduating from PRC to Bermudian.

We do not see any pressing reason why possession of a PRC should be a precondition to applying for Bermudian status. We suspect this might be seen as a way to address the Commonwealth citizenship requirement for those applicants who do not possess such citizenship. They would be able to apply for naturalization as a BOTC under the BNA after one year free of immigration control which, as considered in the case of Carne and Correia, could occur when a person possesses a PRC.

However, it is our understanding that, in the past, when a person was approved for the grant of Bermudian status, the Governor would accordingly naturalize a person as a BOTC so that he or she could meet the Commonwealth citizenship requirement for Bermudian status.

Requiring PRC does not seem to be a useful policy considering that (1) not all Bermuda status applicants would need to be naturalized as some would be Commonwealth citizens, (2) some persons can be naturalized in any event without needing a PRC (and would accordingly be free of immigration control – see Williams and Barbosa), and (3) in the past, naturalization would follow the grant of Bermuda status.

As noted above already, allowing persons born in Bermuda or who arrived here before their 6th birthday would largely scoop up the most pressing humanitarian cases that we are aware of. In addition, Government may simply wish to abolish the 15 year PRC pathway altogether – in which case, the requirement for PRC prior to status should certain go since there must be some pathway towards full civic and political rights (however long that pathway is set).

If the PRC pathway were abolished and the legislation simply allowed persons to apply for Bermudian status at the 20 year mark, we note that non-PRCs would have to have been subject to work permit control for 20 years versus 15 years.

Recall Government's released statistics on work permit holders from the 2010 census:

Total	6,421
Less than 15 years	5,738
15-19 years	241
20-24 years	164
25+ years	106
Not stated	172

An obvious theme from the data is that, the longer a person stays in Bermuda on a work permit, the less likely he or she is to remain; there tends to be a much higher turnover rate of work permit holders who have been here for short periods of time. This is why we think the 15 year PRC and 20 year status pathway would feature far smaller numbers that critics of Pathways have contended. Nonetheless, removing the 15 year PRC pathway but retaining the Bermudian status at 20 years, would likely mean even smaller numbers under the legislation going forward.

We note that this might not have Government's full desired effect in terms of fostering population growth and foreign direct investment. We certainly do not advocate for it. However, it might have the effect of creating a policy which most Bermudians can buy into.

10. The rule that says the spouse of a new Bermudian has to wait a further 10 years before being able to apply for Bermudian status in his or her own right needs to be relaxed, especially where the couple have been married for a considerable period of time already.

The effect of section 19A of BIPA, which governs the entitlement of the spouses of Bermudians to apply for Bermudian status, is that, where there are two non-Bermudians who are married and one obtains Bermudian status, the other will have to wait 10 years before he or she can apply for Bermudian status. This is because section 19A(2)(a)'s requirement that

Section 19A(1) and (2) of BIPA provide as follows:

"Right of spouses to Bermudian status

19A (1) A person may apply to the Minister under this section for the grant to him of Bermudian status.

(2) This section applies to any person who is a Commonwealth citizen and in relation to whom the following requirements are fulfilled—

(a) for the period of ten years immediately preceding the application the applicant has been married to a spouse, <u>who throughout that period possessed Bermudian status</u>;

(b) for a period of seven years preceding the application the applicant has been ordinarily resident in Bermuda;

(c) there is enclosed with the application a letter from the applicant's spouse supporting the application.

(3) In construing subsection (2)(b), the following rules shall apply—

(a) the applicant must have been ordinarily resident in Bermuda for the period of two years immediately preceding the application;

(b) the applicant must have been married to the same spouse for the whole of the seven years in question;

(c) in calculating those seven years, no residence in Bermuda other than ordinary residence for a continuous period of twelve months or more (being a period during which the applicant was married to the spouse referred to in paragraph (b)), shall be taken into account. "

We have some concerns about this requirement. We would recommend that, in the event that the Bermudian and non-Bermudian have been married for the full 10 years, the Minister should have a discretion to waive the requirement the underlined requirement above in subsection (2)(a) as part of a joint family application for status. This could be structured in a similar manner to our recommendation for allowing the minor children of newly-naturalized Bermudians to be registered as Bermudians themselves.

11. Regardless of the results of this year's referendum on same sex marriage, the genuine and subsisting partners of Bermudians should be allowed to apply for Bermudian status on the same basis as married heterosexual Bermudians.

We are aware of many LGBTQ Bermudians who have had to relocate overseas in order to be with the persons that they love in countries with far more accommodating laws for same sex couples. If Government is serious about growing our population and bringing back young, economically productive workers and residents, these Bermudians must be able to return to Bermuda with their partners.

This piece might have to await the result of this year's referendum on same sex marriage. If Bermudians were in favour of either same sex marriage or civil unions, it must logically flow that consequential

amendments are required to BIPA to allow same sex spouses or civil partners to apply for Bermudian status in the same circumstances as opposite sex spouses of Bermudians. Otherwise, this area of law may be the subject of a challenge under the Human Rights Act 1981 on grounds of sexual orientation.

Regardless of the result of the referendum, it seems that Government should nonetheless allow persons who have been in a genuine and subsisting relationship with a Bermudian for 10 years (regardless of whether a same sex or an opposite sex relationship) and who have been ordinarily resident in Bermuda for 7 years, should still be able to apply for Bermudian status in the same circumstances as the spouses of Bermudians. Similarly, this could also be the subject of a challenge under the Human Rights Act 1981 on grounds of sexual orientation or marital or family status.

The Minister issued instructions in March 2015 supplementing the meaning of 'sponsored dependents' under the Work Permit policies. In summary, the Department of Immigration will land the partners of Bermudians, PRCs or Work Permit holders in a relationship akin to a marriage for at least two (2) years prior to the date of application.

We believe that this should eventually be legislated. We also think that a 'genuine and subsisting partner' (regardless of gender and sexual orientation) should be entitled to be treated as if he or she were married to a Bermudian or PRC. It is our understanding that the Bermuda Bred case already addresses the extension of spousal rights to same-sex partners of a Bermudian and accordingly are to be treated as the spouse of a Bermudian. We believe that this should extend to the unmarried partners of heterosexual Bermudians.

We also believe that anyone falling in this category and who would qualify for a grant of Bermudian status under section 19A but for the presence of a marriage legally recognized in Bermuda. That is, any 'genuine and subsisting partner' of a Bermudian living as such for 10 years or more and ordinarily living in Bermuda for 7 years should be allowed to apply for Bermudian status.

To that end and in the event that the referendum endorses neither same sex marriage nor civil unions, section 19A could be amended as follows:

> ***"Right of spouses to Bermudian status***
>
> *19A (1) A person may apply to the Minister under this section for the grant to him of Bermudian status.*
>
> *(2) This section applies to any person who is a Commonwealth citizen and in relation to whom the following requirements are fulfilled—*
>
> > *(a) for the period of ten years immediately preceding the application the applicant has been married to a spouse, or the genuine and subsisting partner of a person, who throughout that period possessed Bermudian status;*
> >
> > *(b) for a period of seven years preceding the application the applicant has been ordinarily resident in Bermuda;*
> >
> > *(c) there is enclosed with the application a letter from the applicant's spouse supporting the application.*
>
> *(3) In construing subsection (2)(b), the following rules shall apply—*

(a) the applicant must have been ordinarily resident in Bermuda for the period of two years immediately preceding the application;

(b) the applicant must have been married to the same spouse or have been the genuine and subsisting partner to the same person for the whole of the seven years in question;

(c) in calculating those seven years, no residence in Bermuda other than ordinary residence for a continuous period of twelve months or more (being a period during which the applicant was married to the spouse or was the genuine and subsisting partner to the same person referred to in paragraph (b)), shall be taken into account.

(4) The Minister shall not approve an application under this section if—

(a) in the Minister's opinion the applicant has been estranged from the applicant's spouse or partner within the period of two years immediately preceding the application; or

(b) the applicant has between the earliest date of the period mentioned in subsection (2)(b) and the date of the application been convicted, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the applicant's part; or

(c) the applicant's character or previous conduct otherwise in the Minister's opinion disqualifies the applicant for the grant of Bermudian status, but otherwise the Minister shall approve the application.

(5) An application may be made under this section by a person who was married to a spouse or who was in a genuine and subsisting partnership with a person possessing Bermudian status (a "Bermudian ~~spouse~~ partner") but whose Bermudian ~~spouse~~ partner died before the application was made, but in relation to such a person this section shall apply without modification up to the time of the death of the Bermudian ~~spouse~~ partner and, as respects the time after the death of that spouse, shall apply with the following modifications—

(a) subsection (2)(a) shall be deleted and it shall be provided instead that the application must be made not earlier than ten years after the marriage to the Bermudian ~~spouse~~ partner was celebrated or after the Bermudian ~~spouse~~ partner acquired Bermudian status, whichever of those events occurred later;

(b) subsections (2)(c) and (3)(b) shall be deleted;

(c) subsection (3)(c) shall be amended by deleting the brackets and the words within them and substituting "(being a period occurring after the marriage to the Bermudian ~~spouse~~ partner was celebrated or after the Bermudian ~~spouse~~ partner acquired Bermudian status, whichever of those events occurred later)";

(d) subsection (4)(a) shall be deleted and it shall be provided instead that the applicant must not, in the opinion of the Minister, have been estranged from the applicant's Bermudian ~~spouse~~ partner at or within the period of six months immediately preceding the death of the Bermudian ~~spouse~~ partner.

(6) Subsections (3) and (5) to (9) of section 19 shall have effect mutatis mutandis in relation to applications under this section as those subsections have effect in relation to applications under section 19."

Such an amendment would have the result of encouraging many Bermudians to consider relocating back to Bermuda with their partners, thus helping to increase our residential population with economically viable individuals, while also being fair and helping to immunize the Government from judicial challenge under the Human Rights Act 1981.

12. Section 20B (the so-called "sleeping provision" made possible by Carne and Correia) must not be repealed until such time as a future pathway to Bermudian status is established.

Clause 9 of the Bill would repeal section 20B of BIPA. This was the provision which was the subject of litigation in both the Carne and Correia case. This sleeping provision made the new 'pathway to status' possible for PRCs who had lived in Bermuda on or before 31 August 1989.

The relevant explanatory note to the Bill states as follows:

"Clause 9 repeals ... section 20B (right to Bermudian status in certain other cases). As section 20B applies only to certain Commonwealth citizens who were ordinarily resident in Bermuda on 31 July 1989, this amendment would affect only such persons who have not applied for Bermudian status before the Act comes into operation. However, once the Act comes into operation, section 20BA would offer an alternative pathway to status."

It would make sense to remove this provision since clause 10 of the same Bill would introduce a new pathway to status for long-term residents in Bermuda for 20 years or more. These old provisions would have no role to play any longer.

Now that the Bill is being split into three, we must ensure that Clause 9 is not included in the legislation until the final tranche of "Pathways" is considered (and in any event, this is subject to our earlier comments that section 20A should remain in BIPA in a revived form).

13. We have no comment to make in respect of a number of other provisions made in the Bill and support their inclusion in the legislation.

Clause 11 of the Bill would repeal sections 20C to 20F of BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 11 repeals section 20C (qualification for grant of Bermudian status under sections 20D to 20F), section 20D (right of siblings of Bermudians to Bermudian status), section 20E (right of parents

of Bermudians to Bermudian status) and section 20F (right of non-Bermudian Parliamentary Electors to Bermudian status) as, under section 20C(2)(d), these provisions are spent. (Section 20C(2)(d) requires a person making an application under section 20D, 20E or 20F to have done so before 1 August 2010.)"

Clause 12 of the Bill would make minor amendments to Section 22 of BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 12 amends section 22 (loss of Bermudian status) to add references to section 20 (right of persons within s 16(2) to Bermudian status) and to the newly inserted section 20BA. For clarity, it also replaces the incorrect expression "adopted parent" with "adoptive parent"."

Clause 16 of the Bill would amend section 31C of BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 16 amends section 31C (rights, etc. of permanent residents) in subsection (1) by changing "permanent resident under section 31A and 31B" to "permanent resident". This reflects the new definition of "permanent resident" inserted by clause 2."

Clause 17 of the Bill would amend section 31D of BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 17 amends section 31D (revocation of permanent resident's certificate) in subsection (1) by deleting "referred to in section 31A or 31B" and substituting "who has been granted a permanent resident's certificate". This reflects the new definition of "permanent resident's certificate" inserted by clause 2."

Clause 18 of the Bill would amend section 92A of BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 18 amends section 92A (restriction on acquiring tourist accommodation or a hotel residence) by repealing subsection (1)(b) as, pursuant to amendments made by the Bermuda Immigration and Protection Amendment Act 2015, tourist accommodation or hotel residences are no longer required to be designated by the regulations as eligible to be held or acquired by restricted persons."

NB - We actually have no comment to make in respect of clause 18.

Clause 19 of the Bill would make consequential amendments to BIPA. The relevant explanatory note to the Bill states as follows:

"Clause 19 makes minor consequential amendments to the Legal Executives (Registration) Act 2011 and the Fisheries Regulations 2010, relating to the description of "permanent resident's certificate" and the definition of "permanent resident" respectively. It also amends the Government Fees Regulations 1976 to add fees for applications under the newly inserted sections."

Clause 20 is a transitional provision. The relevant explanatory note to the Bill states as follows:

"Clause 20 is a transitional provision and is self-explanatory. It states that the provisions of this Act shall not affect any application for Bermudian status, or for a permanent resident's certificate, that has already been made before this Act comes into operation."

Clause 21 allows the Minister to bring the Act into operation by way of notice published in the Gazette. The relevant explanatory note to the Bill states as follows:

"Clause 21 provides for commencement and is self-explanatory."

14. The Bermuda Government, together with Her Majesty's Government, needs to redouble efforts to resolve the Uyghur situation.

Finally, while not directly related to Government's "Pathways" proposals, we urge all parties to seek a resolution to this issue. We understand that this may be an issue that needs to be carefully negotiated with the UK Government. However, many persons making submissions to us spoke of the need to have compassion for these individuals, even if it means facilitating the grant of a passport and having them leave to go elsewhere.