

Written evidence from the Cayman Islands Human Rights Commission (OTS0134)

Executive Summary

In line with its Constitutional mandate the Commission focuses this submission on the Governance of Cayman Islands, especially adherence to human rights as protected within Cayman's own Constitution and under various international human rights instruments extended to the Cayman Islands. Shared funding and resources are provided to the Commission but these are insufficient to ensure compliance with international best practice or with the requirements of Cayman's own Constitution. Similarly, especially when dealing with the issue of LGBT+ rights, there is a conflict within the Islands between the views held by what is a very conservative section of the community supported by the legislature, executive and sections of the church and the equality and non-discrimination requirements of the European Convention of Human Rights ("the ECHR") (to which a right of individual petition exists) and Cayman's own Constitution.

Introduction

The Commission was established under section 116 of the Cayman Islands Constitution Order 2009. The Commission's primary responsibility is to promote understanding and observance of human rights.

The Commission documents its work on its website www.humanrightscommission.ky and in the Annual Reports which are laid in the Cayman Islands Legislative Assembly. The Committee is strongly encouraged to access these resources to identify the full range of human rights issues being addressed, detailing which is beyond the scope of this document.

Current priority areas of concern

- **Prisons**
 - Sub-standard prison conditions
 - Overcrowding
- **Immigration and refugees**
 - Processing of migrants at sea and ashore

- A blanket policy for detention of migrants and asylum seekers
- A lack of sufficient access to legal representation and lengthy appeals process
- Concerns regarding potential breaches of international treaties including United Nations Convention against Transnational Organized Crime (human trafficking) and The International Convention for the Safety of Life at Sea.
- **Equality and LGBT+ rights**
 - Discrimination against LGBT+ persons in the Cayman Islands’ legal framework is extensive. There is little political will to remedy ongoing breaches of the requirements of the ECHR, indeed an overwhelming majority of Cayman’s Members of the Legislative Assembly do not support the reform of discriminatory legislation.
- **Lawful Administrative Action**
 - Failure to ensure human rights compliant policies are written, published, and adhered to (including giving reasons for public officials’ decisions).

1. Prisons

Cayman’s prison system is overcrowded, chronically underfunded and in need of urgent investment. In 2012 and again in 2015 Her Majesty’s Inspectorate of Prisons (“HMIP”) visited the Cayman Islands in announced inspections at Northward (the male prison) and Fairbanks (the female prison). HMIP’s findings on both occasions were damning. In 2015 HMIP found, *inter alia*¹:

- Northward was in a “very poor condition” and was “squalid”.
- Accommodation at Northward was “in an appalling state and hardly fit for human habitation”.
- Accommodation was “dark decrepit and dingy, with leaking roofs, a cockroach infestation, graffiti and dirty cells” there was a “vermin infestation”.

¹<https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2015/06/Cayman-Islands-prisons-web-2015.pdf>

- Toilets were “unscreened and filthy”.
- Natural light “was severely restricted and ventilation poor”.
- “The clinical care environment at Northward was poor” and “the health centre did not meet modern standards for primary care design and infection control”.

HMIP recommended:

“Many of the current facilities at both Northward and Fairbanks should be demolished and the rest should undergo complete renovation. New prisoner accommodation should be developed that provides safe and secure accommodation commensurate with internationally accepted minimum standards.”

HMIP further recommended that the UK should extend The Optional Protocol for the Convention Against Torture (OPCAT) to the Cayman Islands.

Since the 2015 HMIP report was written some improvements (notably the refurbishment of the kitchen at Northward) have been made, however, the overall fabric of the buildings remains in dire condition with urgent investment needed.

The Government has recently established a Prisons Steering Committee, on which the Commission is represented by the Manager of the Commissions Secretariat. The Committee is chaired by the Director of Prisons and includes various stakeholders from across Government including the Department of Community Rehabilitation, the Royal Cayman Islands Police Service and the Health Services Authority. The Steering Committee was created to oversee plans to provide a Strategic Outline Case and thereafter, an Outline Business Case, which it is hoped will eventually lead to the construction of a new prison for the Cayman Islands. The timetable for completion of these initial stages is two years. If approved the procurement and construction would take several more years, meaning that the project is both uncertain and unlikely to be completed for some considerable time; the Commission is of the view that this is an issue which needs to be addressed with greater urgency.

Cayman's prison system has benefited over the last several years from extremely professional and dedicated leadership, despite the lack of resources; successive Prison Directors have achieved commendable improvements in conditions. Equally, the Commission has been grateful for the invariably efficient and timely way in which the Director of Prisons has responded to its enquiries and recommendations and sought to meet human rights concerns with such limited resources. Nevertheless, the fact remains that without immediate and significant investment those incarcerated within Cayman's prisons are at risk of their rights under the Cayman Constitution (ss.3 and 6) and under the ECHR (Art 3) being violated.

The Commission fully endorses HMIP's recommendations and urges that immediate steps be taken to remedy the current situation and prevent more severe human rights concerns developing.

2. Immigration

Due to Cayman's geographical position significant numbers of migrants arrive here by boat from Cuba. Invariably, Cayman is not their final destination, as migrants are seeking to travel to Central America and then on to the United States, however, once in Cayman (whether ashore or in territorial waters) a number of human rights concerns arise.

Cuban migrants arriving in Cayman are either allowed to continue their journeys or permitted to land and processed in accordance with a Memorandum of Understanding signed between the Cayman and Cuban governments ("the MOU"). Both situations raise human rights concerns – in the former these are particularly significant.

Permitting migrants to continue their journeys

If migrants in vessels which are deemed to be seaworthy wish to continue their journeys they are permitted to without any repairs, food, water, safety equipment or other assistance, being provided to them. The Commission remains extremely concerned about how vessels' seaworthiness is determined. Most vessels are open boats fabricated by the migrants with limited resources. "They are often made using either or a combination of wood or metal sheets, having a single engine with direct drive, with or without a non-commercial sail (usually made of plastic or heavy cloth) ... and with supplementary floatation devices (often tire inner tubes or

bags filled with plastic bottles).”² The Commission is not aware of any cases where these vessels were equipped with navigation equipment, life jackets, flares, navigation lights, first aid facilities or radio communications (all of which are required by Cayman law to be part of the equipment of any vessel leaving the islands).

Under the United Nations Convention on the Law of the Sea there is a duty to provide assistance to those in danger at sea.³ Similarly, under the ECHR (and the Cayman Constitution) the state has an obligation to protect the right to life of those within its territory. Permitting vessels to depart from Cayman waters in an unseaworthy state (or without adequate provisions or safety equipment) and continue a perilous journey across hundreds of miles of open sea is contrary to these obligations.

Under the Palermo Protocols to the 2000 Convention against Transnational Organized Crime states are required to adopt measures to prevent people trafficking and migrant smuggling. In order properly to assess whether individuals are being trafficked or smuggled a careful assessment needs to be made, this will frequently involve interviewing migrants privately. This is simply not possible at sea on vessels of the size which Cayman possesses. Permitting vessels to continue journeys without landing their passengers so they can be properly processed risks the facilitation of people trafficking or smuggling.

Landing and processing migrants

When migrants are landed, if they wish to be returned to Cuba they are repatriated in accordance with the terms of the MOU. If they apply for asylum they are processed in accordance with Cayman’s obligations under the 1951 Refugee Convention. Three difficulties arise in this latter situation. First, all migrants and asylum seekers are initially incarcerated in facilities run by the Prison Service. Recent correspondence and submissions from the Commission contributed to a number of asylum seekers being released but since then a number of new asylum seekers have been detained and the presumption remains that all asylum seekers will be detained. The

² Cayman Department of Immigration definition

³ Art. 98: “Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost...”

Commission regards this as arbitrary, unlawful and contrary to Article 31 of the 1951 Convention and the UNHCR guidelines on the detention of asylum seekers. The Commission has written to the Government expressing its concerns on a number of occasions – asylum seekers should only be detained where an assessment shows that it is necessary to protect them or the public or for some other pressing reason.

The second issue concerns the speed with which asylum claims are processed. Recent analysis by the Commission showed that claims (including appeals) were taking between 9 and 36 months to process. In of itself this inordinate delay in determining claims gives rise to human rights concerns regarding access to justice and expeditious determination of rights. When allied to a default position requiring incarceration of all asylum seekers, concerns about breaches of the right to liberty under the ECHR and Cayman's Constitution are engaged.

Recent legislation has established the Refugee Protection Appeals Tribunal which is designed to expedite the appeals process but it remains to be seen when this body will be able to begin hearing matters and how effective it will be in resolving the current delays.

Finally, there are difficulties in obtaining legal representation for asylum seekers to assist with making claims and bring appeals through tribunals and the courts. Following a recommendation by the Commission, the Department of Immigration now maintains a list of lawyers willing to represent migrants in their asylum and appeal applications. This list is not extensive and the Commission is unaware of any legal aid being granted for proceedings at the Immigration tribunal stage prior to Grand Court applications. This lack of access to legal advice and representation also engages asylum seekers' right to a fair trial under the ECHR, the 1951 Refugee Convention and the Constitution.

3. Equality and LGBT+ Rights

Tackling discrimination against LGBT+ persons remains an important challenge for the Cayman Islands. Whilst it remains extremely rare for this discrimination to manifest itself in physical violence or abuse, a culture of homophobic attitudes within sections of the Legislature and vocal sections of the community (particularly some of the churches) has a potent and pernicious

impact, with the capacity to encourage discrimination and bullying and lead to the denial of equal rights for members of the LGBT+ community. The sentiments articulated during a November 2015 debate in the Legislative Assembly regarding marriage are symptomatic of this. Statements were made which included:

- Equating homosexuality with bestiality
- Equating homosexuality with paedophilia
- Claiming that homosexuality was “deviant behavior”, “wicked and immoral” and a “social and moral evil”
- One MLA making veiled personal threats of violence towards homosexuals

These statements went unchallenged in the Legislative Assembly and gave rise to a protracted exchange of correspondence between the Commission and the Premier which can be found on the Commission’s website. The Commission made certain recommendations in accordance with its Constitutional mandate:

“...that the Government immediately:

1. Introduce legislation to recognise same-sex unions;
2. Introduce legislation to outlaw discrimination on the basis of sexual orientation; and,
3. Issue a statement condemning the statements made in the Legislative Assembly in the strongest possible terms and confirming its commitment to uphold the principles of non-discrimination enshrined in section 16 of our Constitution and required under our international treaty obligations.”⁴

It is a source of regret that, over three years later, the Commission’s recommendations have still not been adopted. More regrettably still, the Government is currently contesting a Judicial Review being brought by a same-sex couple seeking the right to marry. It is the Commission’s view that this is an inexcusable waste of public funds; expended purely for political reasons to placate the demands of the more vocal discriminatory voices in the Cayman community.

⁴ http://www.humanrightscommission.ky/upimages/publicationdoc/12320890_1468608882_1468608882.PDF

Clearly, the provision of a framework for legal recognition for same-sex partnerships is now urgently required; it is undeniable that it is unlawful under the ECHR to fail to provide equality to same-sex couples in areas as diverse as adoption, inheritance, pensions, next of kin visiting rights, access to welfare and even to residency in the Islands.

At a speech to mark International Human Rights Day on 10 December 2018 Lord Ahmed, the UK government minister with responsibility for both human rights and the Overseas Territories, noted that the United Kingdom will take over as co-chair of the Equal Rights Coalition, a grouping of 40 countries working together towards LGBT equality. He was also explicit about the UK's commitment to human rights:

“...the UK government has been a champion of human rights, fundamental freedoms, and democratic values. Let me assure you this will continue to be an absolutely integral part of what we do in Government as part of British foreign policy.”

He concluded his speech noting:

“Sitting back and saying, “Isn't this terrible, what more can be done?” On a point of personal reflection, more can be done and often the question lies within yourself.

Because, if we collectively do more we will be able to start making the kind of differences we all wish to see. One of my biggest heroes in my life, who shaped many things in how I looked at the world was Ghandi. He famously said that “we must become the change we wish to see”. Let us become that change, let us ensure we stand up with passion, with vigour, with commitment and emulate the bravery of human rights defenders around the world to ensure that we play our part...”

It is regrettable that, despite the clear breaches of an international treaty extended to the Cayman Islands (and other Overseas Territories), which creates directly-enforceable rights for individuals, the UK government has not taken action to remedy this ongoing human rights violation. The UK has the ability to end this legislative discrimination by an Order in Council.

The failure to do so arguably places the UK itself in breach of its legal obligations under the ECHR. The UK Parliament has recently shown its willingness to legislate for its Overseas Territories (without consultation) on beneficial ownership; the decision not to act where the fundamental human rights of British citizens within its jurisdiction are concerned is hard to justify. The laudable foreign policy statements articulated above by Lord Ahmed should be acted upon.

4. Lawful Administrative Action

The Constitution provides requirements related to lawful administrative action (s.19) and the duty of public officials (s.24). Public officials have a duty to ensure all decisions are lawful, rational, proportionate, and procedurally fair. In addition public officials must document their reasons for these decisions or acts to be able to provide to individuals when requested.

Since its creation the Commission has spent a considerable amount of time addressing issues related to administrative practices by the Government which violate individuals' rights. Whilst breaches of these Constitutional rights are generally not of the same gravity as the other concerns outlined above, the day to day impact on the public of the failure of public officials to respect and comply with these provisions should not be underestimated. On a daily basis the decisions and acts of public officials significantly affect the lives of many individuals. Whilst there are signs that a culture of compliance with these important Constitutional requirements is developing there remains significant scope for improvement.

Recommendations for Action

1. Urgent action should be taken to implement HMIP's recommendations in respect of Cayman's prisons and prevent more severe human rights concerns developing for serving prisoners and those on remand.

2. An immediate assessment should be undertaken of the UK and Cayman's obligations in respect of migrants passing through Cayman in order to prevent loss of life, people trafficking and ensure compliance with the 1951 Convention on the Status of Refugees.
3. Immediate steps should be taken to introduce legislation to recognise same-sex unions and to outlaw discrimination on the basis of sexual orientation in the Cayman Islands as a matter of the greatest importance.
4. Improved education for public officials regarding their lawful administrative action obligations and the development of written policies and procedures to guide public officials' decision-making should be an ongoing priority.
5. Greater engagement and support from the Foreign and Commonwealth Office directly with the Commission (and other OT's Human Rights Commissions) would be extremely welcome. In 2016/17 an FCO contact, Ms Camisha Bridgeman, was instrumental in beginning this engagement and helped to develop extremely helpful contacts and training. Regrettably, since Ms Bridgeman moved on to other duties this progress has not continued and has been allowed to stagnate.

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