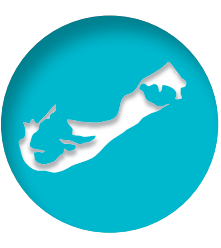




# HUMAN RIGHTS COMMISSION 2017 ANNUAL REPORT





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### ACCESSIBLE FORMATS

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The Hon. E. David Burt JP MP  
Premier of Bermuda  
The Cabinet Office  
Innovation House  
46 Reid Street  
Hamilton HM 12  
Bermuda

Dear Premier Burt,

It is my pleasure to submit the Annual Report of the Bermuda Human Rights Commission for the reporting period January 1, 2017 to December 31, 2017.

We submit this report to you for presentation to the Legislature in accordance with Section 30A of the Human Rights Act 1981.

Respectfully,

A handwritten signature in black ink, appearing to be "Tawana Tannock". The signature is written in a cursive style with a large, sweeping loop at the end.

Tawana Tannock  
Human Rights Commission | CHAIR





It is my honour to serve as the Chair of the Human Rights Commission, and I welcome the opportunity to present this year's Annual Report. 2017 saw the Commissioners entering the second year of service in their 3 year term. It was an eventful and challenging year, both for the community, and the Human Rights Commission.

Upholding the integrity of the Human Rights Act underpinned our engagement with the former and current government during the course of 2017. The Human Rights Act was enacted in 1981 to build upon the rights enshrined under the Bermuda Constitution 1968. The Constitution was written at a time when racial segregation still existed in Bermuda, and it remains limited and dated in its scope. The Human Rights Act emerged to address stark omissions, and provide both a practical and

aspirational framework for protecting distinct, yet intersected, rights in our community. Amendments that seek to manipulate or weaken the function of the Act risk undermining all protections within it, and must be vigorously guarded against and examined. The Act must continue to evolve to meet the needs of our diverse and developing island; and to serve as a measure of our commitment to creating an inclusive and equitable community.

Over the past year, the Commission continued to navigate its transition to a non-Ministry agency, fostering greater independence in line with the Paris Principles, the international standard that serves as a good governance framework for National Human Rights Institutions. Advocating for amendments to align the Human Rights Act with the new organisational model was ongoing, with a focus on monitoring and evaluating existing practices to strengthen the enhanced governance role of Commissioners.

An important component in serving as a Commissioner is to assist in promoting the educational mandate of the Office, inclusive of our own continued learning and development in support of rights issues. Commissioners participated in a variety of panel discus-

sions, roundtables, consultations and public advocacy events throughout the past year. Each interaction reinforces the urgency of our work, and the necessity of both balancing and advocating for the advancement of rights for all.

It is an honour and a significant responsibility to serve as a Human Rights Commissioner.

I wish to extend my appreciation to my fellow Commissioners for their service over the past year. On behalf of the Commissioners, I extend appreciation to the Executive Officer, Lisa Reed, and the team of Officers at the Commission who diligently work to do more with less, and strive each day to bring the Human Rights Act protections to life for all those we serve.

Sincerely,

A stylized, handwritten signature in black ink, consisting of a large loop and a long horizontal stroke.

Tawana Tannock  
Human Rights Commission | CHAIR



*“When elephants fight, it’s  
the grass that suffers”*

– Angolan proverb

It is inevitable that when political parties demonstrate their leadership prowess during an election period, the country becomes gripped in somewhat of a dizzying holding pattern. Headlines are naturally dominated with electoral coverage, and there is simply less focus being given to matters on the ground. So was the case for Bermuda in 2017.

The Commission itself is necessarily non-partisan, however, the organization, as with the public we serve, was not immune to the tumult. 2017 reinforced the importance of holding steady as a service agency, regardless of political discourse of reshuffling of priorities. Staying the course to meet the needs of the community, as well as being persistent in advocating for longstanding organizational needs is paramount. Regardless of the type of resistance, we cannot afford to lose sight of the need to address capacity issues as a result of the hiring freeze and legislative updates to meet the needs of our community.

2017 was marked by significant national events that rocked the community. The year was punctuated by members of the public exercising their right to advocate for change on a number of hard hitting and urgent matters. High profile civil action cases revolving around LGBTQ equality, together with government’s ongoing duty to meet the European Court of Human Rights duties in support of same-sex couples, featured heavily in the headlines. While the protections of the Human Rights Act were being exercised, the Human Rights Commission was often incorrectly referenced as ‘bringing these cases’ forward – in reality, the day to day work of the Commission was consumed with facilitating complaints of discrimination from Bermudians and non-Bermudians alike. Complaints based on the grounds of race and national origin continued have the highest frequency in the area of employment followed by sexual harassment and disability.

The experience of discrimination or harassment can have life-long impacts that move beyond the individual experience, to affect the health and well-being of an organisation and ultimately the community as a whole. Investing in upholding human rights – and the distinct intersectional issues they represent, such as racism, gender disparity or disability – is vital to ensuring we are actively addressing systemic, exclusionary practices and holding to account behavior that undermines the health and well-being of all our community members.

The Human Rights Act inevitably intersects with almost all areas of life in Bermuda, and our efforts over the last year were enriched by the dedicated civil servants, educators, business, religious and spiritual leaders, service

providers and partner agencies that work with us to educate, reflect upon and promote the rights for all those in Bermuda.

I am pleased to share a summary of the Commission’s accomplishments in fulfilling its commitments. The Commission continued to pursue service excellence and the application of best practices in the protection and promotion of human rights in Bermuda.

To those who have come forward to request assistance, express concerns, submit complaints or share ideas in support of our mandate - thank you for entrusting us with your experience, insight and thoughts.

I would like to extend my heartfelt thanks to the Officers and Commissioners for their commitment to ensure the best possible service delivery throughout the year. While it is a privilege to steward the mandate of the Human Rights Commission, it can definitely be uphill work; it often feels we take two steps forward only to find ourselves 3 steps back. However, each incremental victory is to be celebrated, as we know that nothing worth fighting for comes easily.

I present the 2017 Annual Report for your review.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Lisa M. Reed', written over a light blue circular stamp.

Lisa M. Reed  
Human Rights Commission  
EXECUTIVE OFFICER





# THE HUMAN RIGHTS COMMISSION



## VISION

The Human Rights Commission envisions **a community that honours and protects human rights for all.**

## MISSION

As the national authority of human rights in Bermuda, our mission is **to eliminate discrimination through advocacy, education and enforcement.**

## MANDATE

In accordance with the Human Rights Act (the “Act”) the statutory functions of the Commission are two-fold and are aimed at eliminating all forms of discrimination in Bermuda. The Commission’s mandate is to educate and promote the concept of equality of all members of the community and, as well, to investigate and endeavour to settle allegations of discrimination.

Under Section 14 of the Act, the Human Rights Commission is responsible for administration of the Act and shall:

- Encourage an understanding of the fundamental rights and freedoms of the individual guaranteed by the Constitution and the principle that all members of the community are of equal dignity, have equal

rights and have an obligation to respect the dignity and rights of each other;

- Promote an understanding of, acceptance of, and compliance with the Act;
- Develop, conduct research and arrange educational programmes designed to eliminate discriminatory practices;
- Encourage organisations within the community and individual persons to carry out activities which will attract all members of the community whomsoever;
- Encourage and coordinate activities which seek to forward the principle that every member of the community is of equal dignity and has equal rights; and
- Promote the conciliation and settlement of any complaints or grievances arising out of acts of unlawful discrimination and, where in its opinion such good offices are inappropriate, institute prosecution for contraventions of the Act.

The Commission is both a watchdog for human rights compliance, and a resource to work with stakeholders across the island in fulfilling their compliance commitments, works toward the promotion of accessible and just legislation, policy and practices that support the principle of non-discrimination and equal access.

## CONTACTING THE HUMAN RIGHTS COMMISSION

**Timing for Complaints:** Human Rights complaints should be made within six months of any incident of alleged discrimination, harassment or sexual harassment, and the complaint must fall within one or more of the areas covered by the Human Rights Act. Complaints submitted after 6 months limit the jurisdiction of the Executive Officer to entertain and investigate a complaint. The Act allows for the Executive Officer to consider a complaint up to two years after the event provided there is good reason for the delay and that no one will be prejudiced by the delay (see Section 14(H)).

**Queries:** Queries are also treated confidentially. The Commission understands that there are many reasons that can lead to a delay in coming forward with concerns. We encourage the public to call the Commission with any and all questions – there are no wrong questions. Do not hesitate to reach out, as we may be able to offer some clarity in terms of services available, and if we are unable to assist, we will work to identify the most appropriate referral agencies.

**Educational requests:** The Commission is a resource for the public and can be reached via email or phone with requests for policy or training assistance, presentations, or to address questions related to our legislation.

## FEEDBACK AND ACCOUNTABILITY

The Commission welcomes any and all feedback about our services and you can meet with our Executive Officer to discuss concerns—submit them directly to our general email or write to our Office.

## CONFIDENTIALITY AND ACCESS

Each Officer and Commissioner is bound by an oath of confidentiality (Section 30 of the Act), and all queries and complaints are confidentially logged. Given the sensitive nature of our work, especially in a small jurisdiction, this commitment is fundamental for all Officers and Commissioners, and is reinforced to all those who work with us. Our location is also intentionally discreet.





## MEMBERS OF THE HUMAN RIGHTS COMMISSION

The 'Human Rights Commission' is comprised of the independently selected Commissioners and a team of Technical Officers.



**TAWANA TANNOCK**  
CHAIRPERSON



**JOHN HINDESS**  
DEPUTY CHAIR



**BEN ADAMSON**  
COMMISSIONER



**QUINTON BUTTERFIELD**  
COMMISSIONER



**JAHAN CEDENIO**  
COMMISSIONER  
from April 2016



**DONNA DANIELS**  
COMMISSIONER



**CARLA GEORGE**  
COMMISSIONER



**JENS JUUL**  
COMMISSIONER



**DANY PEN**  
COMMISSIONER



**CAROLYN THOMAS RAY**  
COMMISSIONER



**KIM SIMMONS**  
COMMISSIONER



**JONATHAN YOUNG**  
COMMISSIONER

### The Commissioners

2017 saw the Commissioners moving into the second year of their three year term. The Human Rights Commissioners are members of the public selected through a rigorous and independent recruitment process to serve for three year terms. The Commissioners are responsible for adjudicating complaints of discrimination by serving on Tribunals, serving as advocates in the promotion and protection of human rights, and providing governance guidance.

Following the public recruitment and appointment process, eight new Commissioners were selected for the 2016-2018 term and four were reappointed having already served one term. The Commissioners for the 2016-2018 period included: **Chairperson, Tawana Tannock, Deputy Chair, John Hindess, Ben Adamson, Quinton Butterfield, Jahan Cedenio, Donna Daniels, Carla George, Jens Juul, Dany Pen, Carolyn Thomas Ray, Kim Simmons, Jonathan Young.**



## The Officers

The Officers are responsible for the day-to-day operations of the Human Rights Commission. Duties include investigating complaints of discrimination, facilitating conciliation and mediation, researching best practice and legal developments in the field, developing public education giving guidance on policy development to address discriminatory practices, and administering the Human Rights Tribunals. Above all, the Officers are stewards of the mandate and mission of the Human Rights Commission in service to the Bermuda community, and consider it an honour to engage in this work.

### **Lisa Reed**

Executive Officer

### **Sonia Astwood**

Administrative Officer (*Tribunals*)

### **Erlene Postlethwaite**

Administrative Officer (*Intakes*)

### **Sara Clifford**

Education Officer

### **Darnell Harvey**

Investigations Officer

### **Treadwell Tucker**

Investigations Officer

### **Kim Williams**

Projects Officer (*until June 2017*)

## OVERVIEW OF THE HUMAN RIGHTS ACT 1981



'I cannot afford the luxury of fighting one form of oppression only. I cannot afford to believe that freedom from intolerance is the right of only one particular group.

And I cannot afford to choose between the fronts upon which I must battle these forces of discrimination, wherever they appear to destroy me. And when they appear to destroy me, it will not be long before they appear to destroy you.'

~Audre Lorde

The Human Rights Act was enacted in June 1981 by the Legislature, and became operational in May 1982 when the Human Rights Commission was established to administer human rights legislation in Bermuda. The Human Rights Act was intended to extend the rights guaranteed by the Bermuda Constitution 1968, and to address gaps in protection and meet the needs of our community. This evolution is depicted on page 56).

The legislation provides a list of 'grounds' that are afforded protection from discrimination in certain areas of life in Bermuda. The Act continues to evolve.

**Grounds of Protection:** The following list includes the 'grounds' or characteristics:

- Race, Place of origin, Colour,
- Ethnic or National Origins
- Sex or Sexual Orientation
- Marital Status
- Disability
- Family Status
- Religion or Beliefs or Political Opinions
- Criminal Record\* (*except where there are valid reasons relevant to the nature of the particular offence for which they are convicted that would justify the difference in treatment.*)
- Age\* (*except in the area of employment and the Commission continues to advocate for its inclusion.*)

**Areas of Protection:** The Act outlines specific areas of protection from discrimination and harassment: housing and accommodation (Section 4), goods, facilities and services (Section 5) and employment (Section 6). Other areas include: notices (Section 3), organisations (Section 7) and taking part in proceedings under the Act (Section 8).

Protection against harassment (Section 6B) and Sexual harassment (Section 9) are also detailed in the Act. You can refer to Annex 4 for further explanation on the details of these categories.



## EDUCATION AND AWARENESS



In practice, and guiding the work of the Human Rights Commission, the term ‘human rights’ represents a host of urgent, distinct, complex and inter-sected issues that each require their own consideration, care and attention.

At their heart, human rights are fundamental, and serve a significant role in setting a standard for how we wish to treat each other and be treated. We have learned, and history has shown, that without setting these expectations people can be threatened. We need to stay vigilant and aspira-

tional in our commitment to human rights and remain steadfast in their protection.

Chief Justice Ian Kawaley asserted that the Human Rights Act should be afforded, ‘a large and liberal interpretation’, but even with this in mind, legislation alone cannot ensure protection from discrimination or harassment. And even when these expectations of decent behavior and practices are enshrined in law, needless to say, they are not always honoured.

Education is an integral function of the Human Rights Commission, especially as it is designed to expand the protection of the Act and work towards creating a culture where

rights are understood, balanced and respected. Bermuda’s legal commitments in support of the principles of non-discrimination, just access and equality mean very little unless we are actively working to bring them to life each day. Our mandate intersects with almost every area of life in Bermuda, and therefore consideration of the Act and the rights and responsibilities therein must be a shared responsibility with each member of the community.



The work of the education team is diverse and includes research to inform investigations, policy development and analysis, legislative review and associated advocacy, consultations, facilitated dialogues presentations, and public and private engagements to address the broad spectrum of social justice and human rights issues requiring attention. In particular, it involves collaborating with the many advocates, service agencies and thought leaders striving to shine a light on the myriad of rights-issues affecting Bermuda.

**In the following pages, we are pleased to share a handful of pictorial highlights of our community and educational engagements in 2017.**

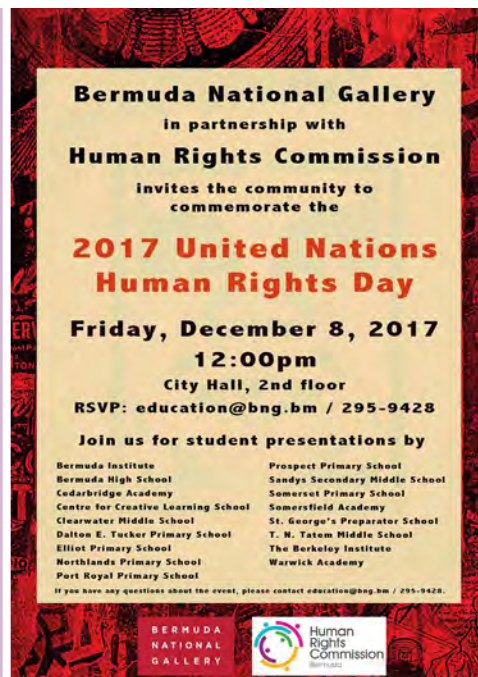
“...One child, one teacher, one book and one pen can change the world... Education is education. We should learn everything and then choose which path to follow.” Education is neither Eastern nor Western, it is human.’

*~Malala Yousafzai*



# HUMAN RIGHTS DAY 2017

While every day should be Human Rights Day, we appreciate the chance to pause and commune with our local partners together with the countries around the world, in honouring the United Nations internationally designated day of 10 December. This year the Commission partnered with the Bermuda National Gallery and invited students to share their thoughts and experiences surrounding issues of equality, discrimination and the art of protest. The students drew inspiration from the impressive collection of 'activist art' on display in the gallery featuring local and international artists. The presentations were outstanding and once again, the honest, courageous and moving presentations by the students reaffirmed why our collective work in support of upholding and protecting rights is so vital.









## MENTAL HEALTH AWARENESS WEEK

The Commission continued to work with and learn from mental health advocates and providers service to educate on the reality of mental health as part of the human experience. With a conservative estimate that 1 in 4 people will experience an acute or episodic mental health crisis in their lifetime, it is vital to challenge stigma and put in place mechanisms to address this health issue in the workplace and community at large. Our work focused on ensuring those in the industry were familiar with the protections afforded under the Human Rights Act in support of mental health, and could advocate more effectively for upholding and expanding those protections in the workplace. The Commission welcomed the chance to participate again in Mental Health Awareness Week coordinated by Morissa Rogers and her stellar team.



## AGE IN EMPLOYMENT

Age discrimination in the area of employment still remains unprotected under the Human Rights Act. The Commission continued to lobby for its inclusion in the Act in 2017 reinforcing the importance of addressing the longstanding issue of age discrimination.

## ADVOCATES OF THE FUTURE



It is pleasing to see so many Bermudians pursuing further studies and interests in support of human rights and related areas. The Commission often receives requests from local students to assist in their school or university research pursuits, and it is always a particular highlight to liaise with the advocates of the future.

## CURB COMMUNITY CONVERSATIONS

In early 2017, Citizens Uprooting Racism in Bermuda (CURB) convened a wide variety of public service agencies to discuss the proposal of a Truth and Reconciliation process for Bermuda. The CURB Community Conversations held in the Spring and Fall 2017 were an important aspect of this proposal allowing for honest dialogue on the pain of racism and its continuing presence in our community. These convenings are designed to change the way we talk about race, justice and poverty and to confront together the history of racial inequality and injustice in Bermuda. The Commission hosted the central convenings, which will be continuing into 2018. 2017 again revealed the persistence of racism – in its many forms - and its impact on our community and our urgent and steady attention required to address and dismantle. (Please see Appendix for full press release outlining the initiative).



PHOTO COURTESY OF CURB



PHOTO COURTESY OF CURB





The United Nations designated 11 October as the International Day of the Girl to recognise the particular struggles that girls face around the world with regard to the denial of human rights. Around the world, girls are targeted for sexual exploitation and violence, and oppressive practices such as child marriage and forced labour. Girls comprise the largest demographic living in poverty globally, and are most often denied educational opportunities. While Bermuda is fortunate to have relative abundance, and security, we often underestimate the specific challenges that girls face. Founded by Commissioner Carolyn Thomas, this free Bermuda event aims to introduce girls to male dominated activities as well as raise awareness about the challenges facing girls around the globe. There were over 400 girls and boys at the 2017 event and a host of vendors volunteering their services to stand in solidarity with girls all over the world.

## ◀ INTERNATIONAL DAY OF THE GIRL 2017









## ◀ OUTBermuda

The Commission was invited to join OUT-Bermuda for their inaugural public convening to engage LGBTQ members, allies and the community at large in a conversation around LGBTQ issues in Bermuda. As Bermuda's first charity offering support for the LGBTQ community and allies, this inclusive and interactive convening was a chance to commune, and collectively explore how to build support for the LGBTQ community in Bermuda.

The action-oriented dialogue was designed 'to assess the role OUTBermuda can play in creating the kind of community that reflects the highest aspirations for our island'.

For more information please visit [www.outbermuda.bm](http://www.outbermuda.bm)





# CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW) ►

CEDAW is an international human rights treaty on equality between women and men and defines discrimination against women. It forms a bill of rights for women worldwide, and sets out a comprehensive framework for tackling gender equality. Under CEDAW, states are obligated to take action to protect women's rights, including, but not limited to:

- appropriate measures to eliminate stereotyping, prejudices and discriminatory cultural practices;
- measures to stop all forms of trafficking and the exploitation of prostitution of women;
- ensuring that women have equal rights with men to vote, hold public office and participate in civil society;
- ensuring that women have the same legal right to enter contracts, own property and choose their place of residence;
- ensuring that women have equal rights with men in relation to marriage and as parents; and
- ensuring that women have equal rights with men in education.

On 16 March 2017 the United Kingdom extended its ratification of the Convention on the Elimination of all forms

of Discrimination against Women to Bermuda.

This was a significant achievement, as it is one of the most widely endorsed Conventions in the world with Bermuda joining 189 countries (including seven UK overseas territories) in signing the treaty.

What does this actually mean for Bermuda? The extension of CEDAW to Bermuda represents the government's legal obligation to work towards implementing CEDAW's provisions and to monitoring and reporting on the measures taken to comply with the treaty obligations across all spheres of life in Bermuda. It means our collective work and commitment to the Convention must be focused and intentional. It is the prioritising of this work that will ensure the health and well-being of women and families in Bermuda. Ensuring compliance to the Convention requires participation by all stakeholders in Bermuda. The Commission remains hopeful that the Convention will receive the attention it deserves as part of the national agenda.

The Ministry of Social Development and Sports coordinated Bermuda's submission under the leadership of Jane Brett, Policy Analyst and Project Coordinator.

The Commission is incredibly grateful to Ms. Brett, together with Permanent Secretary Wayne Carey, for diligently navigating the rigorous submission process, to create an inclusive and collaborative submission enabling Bermuda to at last join nations around the world in supporting the principles laid out in the Convention.

The full Convention can be found online, and the House statement outlining Bermuda's commitment as well as reservations may be found at <http://www.royalgazette.com/assets/pdf/RG362975210.pdf>

The full list of Conventions extended to Bermuda is on the [UK National Archives](#) Bermuda page, and the [UK Treaties Online](#) website provides details of these treaties. A few of the specific human rights related Conventions that have been extended to Bermuda include, but are not limited to:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural rights
- Convention Against Torture
- Convention on the Elimination of Racial Discrimination
- Convention on the Rights of the Child





The formal extension of the Convention took place on 16 March 2017 in a ceremony at the United Nations in New York.



## NETWORKING, LEARNING, AND BEST PRACTICE

‘If you want to go  
fast, go alone,  
if you want to go  
far, go together!’

*~African Proverb*



PHOTO CREDIT: MARY PARCHILD, MYFARLADY.COM

There is no question that the nature of rights work is necessarily collaborative. The protections under the Human Rights Act mean little unless they are understood and embedded into the organisational commitments and decision making of governments, businesses and service agencies.

Fostering trust and investing time into relationship-building with the public, and the diverse range of stakeholders we served, is an integral duty of the Commission. Cooperation and dialogue on rights matters with both local and international advocates enhances the Commission's expertise and provides an opportunity to integrate different perspectives and methods into

our work. Most importantly, collaboration offers an essential means of fulfilling our work in a responsible, resourceful and relevant manner.

Just as the human rights space is dynamic and evolving, so too must be the skills and services of the Officers. Continual learning and development is fundamental to meet the changing needs of this dynamic field. The following is a sample of some engagements in 2017:

**Local Rights Based Agencies:** 2017 saw tremendous advocacy in the community in the areas of mental health, racial justice, political and religious freedoms, women's issues, LGBTQ rights, accessible health care practices and environmental protection. The Commission valued the opportunity to serve as a resource for various support

services working hard on the front line to help the community in advancing these urgent issue areas.

**Virtual Networking:** The opportunity to exchange ideas and lessons learned with colleagues around the world is essential in this field. The Commission is committed to constantly assessing and developing our procedures, practices and policies and expanding the network of colleagues allows us to seek out expertise and feedback as we strive to evaluate and improve practices. Online information exchange provides an inexpensive and expedient means of advancing learning in the absence of face-to-face training or engagement.

### **Northern Ireland Human Rights Commission:**

The Northern Ireland Human Rights Commission (NIHRC) co-facilitated the first convening of Overseas Territories Human Rights agencies in 2016, and the Commission learned a great deal from their exemplary model. The NIHRC approached the Commission in 2017 to learn more about Bermuda's experience with civil unions and same-sex marriage. Bermuda's unique experience offers plenty of lessons learned for other jurisdictions seeking to progress toward equal rights for the LGBTQ community.

**Regional Consultations:** The Commission continued to foster relations with regional colleagues in the Caribbean working in the field of human rights. Despite the challenges and setbacks we experience in Bermuda as relates to rights, it is important to remember that Bermuda has the oldest human rights office in the Caribbean and it is viewed as a model for countries working hard to establish their first human rights national institutions in the midst of challenging sociocultural realities and resistance.

**Relationship Building:** The Education Officer took advantage of a scheduled trip to the UK to coordinate research and development meetings in support of best practice with several rights based agencies. The Commission extends its thanks to the UK Equality and Human Rights Commission; The Runnymede Trust; MIND UK; Rethink UK; Judicial College and the Commonwealth Secretariat.

The Human Rights Commission Officers participated in a two day **Investigator's Training** course hosted by the Information Commissioner's Office and facilitated by Gareth Jones, a former lead investigator for the Ontario Ombudsman's office. The course was a chance to revisit established methodologies and consider current best practice in the field.

**PIPA 101:** In anticipation of the Personal Information Protection Act (PIPA) 2016 coming into effect, the Commission invited former Commissioner, Kai Musson, to present an overview of the legislation that will come into force.

The Officers of the Commission regularly engage in legal education to review jurisprudence pertinent to the work of the Human Rights Commission, and Bermuda's human rights framework as a whole. This year we discussed the potential impact of court decisions on the Human Rights Act 1981.

Officers took advantage of a host of educational offerings to help 'sharpen the saw' and continue developing their professional skillset, course offerings by the Department of Human Resources, Chamber of Commerce, Bermuda Human Resource Association, and Chartered Professional Accountants Association, etc.







## RIGHTS IN THE NEWS

It was a tumultuous year for the community with a host of significant national events stirring our collective consciousness. The following reflect a small sample of rights-related issues that made the news during the year; some involve the Human Rights Commission directly, and others invoke the spirit of the Act, if not the specific protections and duty of the Act itself.



## Protest and Politics

Bermuda will not soon forget the painful events of 2 December 2016, the aftermath of which featured heavily in 2017 with associated court cases, reports and public debate dominating the headlines and social media forums. The initial event that prompted the protest – concern surrounding the awarding of the airport contract and associated lack of inclusive consultation, while significant, pales in comparison to the events of the day, and the sharp divide that emerged along political and racial lines. The methods used by police to disperse the crowds of protesters, escalated into an unexpectedly violent scene. In the aftermath, the cumulative impact of unaddressed grievances under the former administration spilled over revealing an ‘us’ vs ‘them’ chasm. An outpouring of public advocacy expressing shock and discontent, heated debates about the role of protest as a longstanding civil right together with accusatory finger pointing continued to impact the community over the last year. The event and associated shock, anger and pain reinforce the collective work that is required to address not just the issue of immigration, but the sharp racial divide that continues to shape the the experience of Bermudians on a daily basis.

## United We Stand: Working towards LGBTQ Inclusion

The decision of *Oliari v Italy* and the European Court of Human Rights reinforced that Lesbian and Gay people possessed the Right to Family Life, just like heterosexual people. This right required governments to provide some form of legal framework to committed Lesbian and Gay couples. Following the ineffectual events of 2015 and 2016 revolving around the former administration’s duty to provide equality mechanisms for same sex couples, the Commission issued a statement expressing concern about the proposed referendum, rejecting outright the notion that the opinion of the majority should impinge on the right of equal treatment for minorities.

2017 saw the Bermuda government (under two different administrations) still grappling with its commitment to equality for same-sex couples both from a socio-cultural and legal perspective. Several civil action arose to address concerns about discriminatory practices. As we write this reflection from the future (2018), we know all too well that rights cannot ever be taken for granted. We remain committed to advocating for the extension of full and equal rights for all our community members.





## Upholding Human Rights Legislation: The Challenge Continues

In 2016, Tawana Tannock, the Commission Chair issued a statement on behalf of the Commission denouncing the House of Assembly's passing of the controversial Human Rights Amendment Bill, 2016. The Bill intended to separate the Matrimonial Causes Act 1974, from the anti-discrimination protection of The Human Rights Act 1981, thereby legally permitting discrimination against individuals based on marriage, and enshrining discrimination in the Human Rights Act 1981 – the very Act developed to provide protection from discrimination. Thankfully, the attempt to undermine the Bill was defeated in the Senate, however it reinforced the danger in manipulating the Human Rights Act, and called attention to the intersectionality of rights protections and the need to urgently define our national vision for equity, access and inclusion in Bermuda.



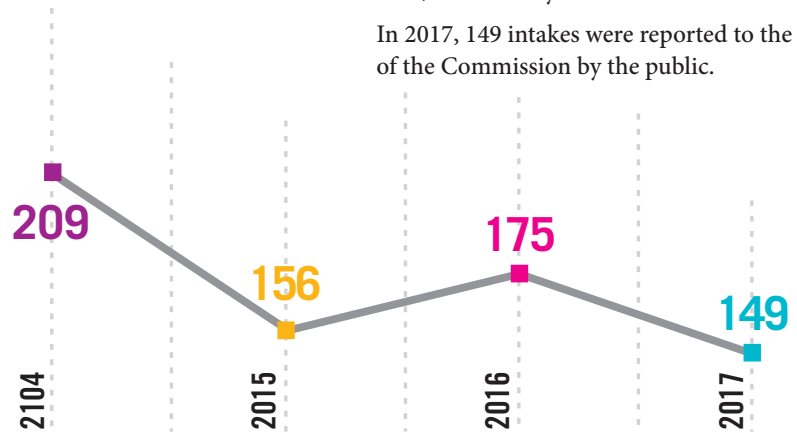


# HUMAN RIGHTS COMMISSION STATISTICS

**Figure 1.**  
**TOTAL INTAKES, 2014 - 2017**

An intake is any form of contact made by a member of the public, whose intent it is to bring to the attention of the Commission a complaint or query. An intake may be lodged by telephone, mail, e-mail or by walk-in.

In 2017, 149 intakes were reported to the Office of the Commission by the public.



**Figure 2.**  
**INTAKES BY TYPE, 2014 - 2017**

Intakes are comprised of complaints and queries. A complaint is any concern brought to the attention of the Commission by a member of the public who believes their rights have been contravened under the Human Rights Act 1981 (the "Act"). A query is a request for information or any question regarding the Act.

Complaints make up the largest share of intakes heard by the Commission. In 2017, of the 149 intakes, 112 were complaints, while the remaining were identified as queries. (N.B. This figure does not include educational or related queries).

■ Complaints  
■ Queries

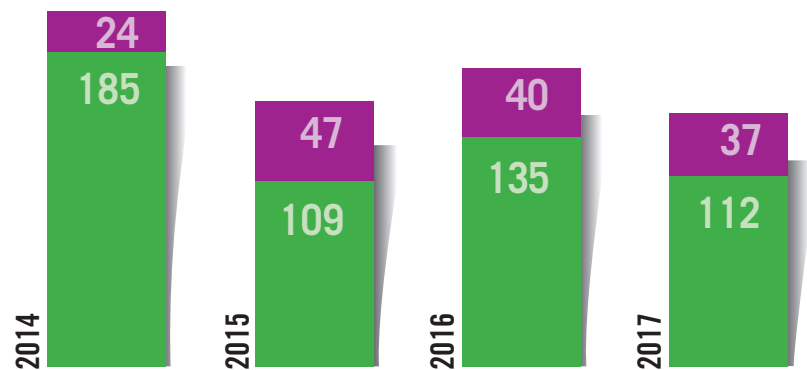
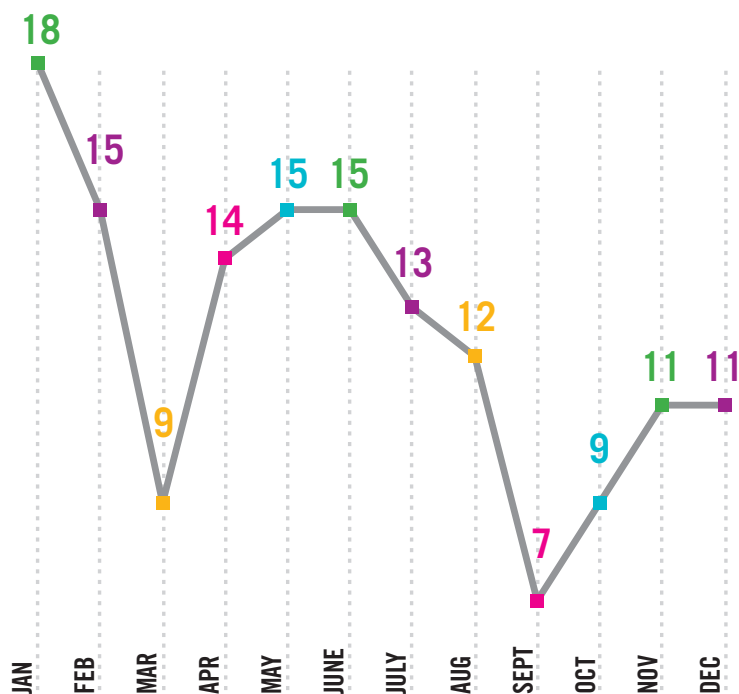
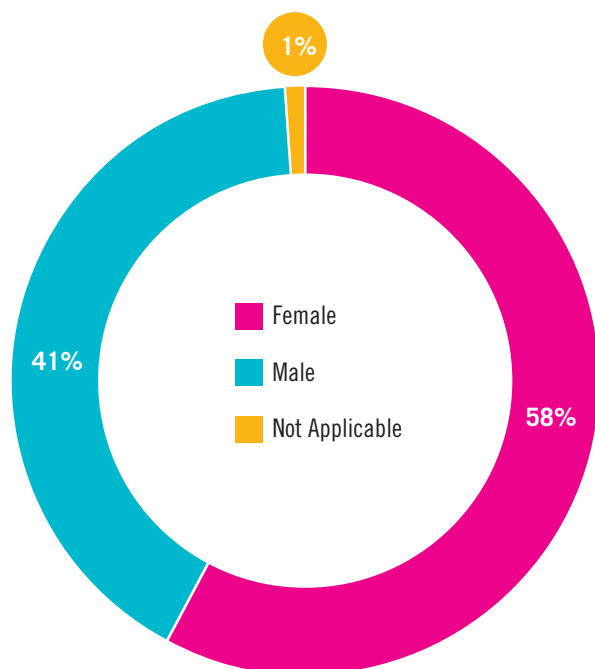


Figure 3.  
INTAKES BY MONTH, 2017



In 2017, of the total monthly intakes, the largest number was received in January at 18 intakes. The least amount recorded was for the month of September at 7 intakes. The mean average intakes received per month was 12.

Figure 4.  
PERCENTAGE DISTRIBUTION OF INTAKES BY THE GENDER OF THE COMPLAINANT, 2017



In 2017, females approached the Office of the Commission more frequently than males. Female Complainants represented 58% of Complainants while males comprised 41%.

Any member of the public, who contacts the Commission and is recorded as an intake, is classified as a Complainant for procedural purposes.

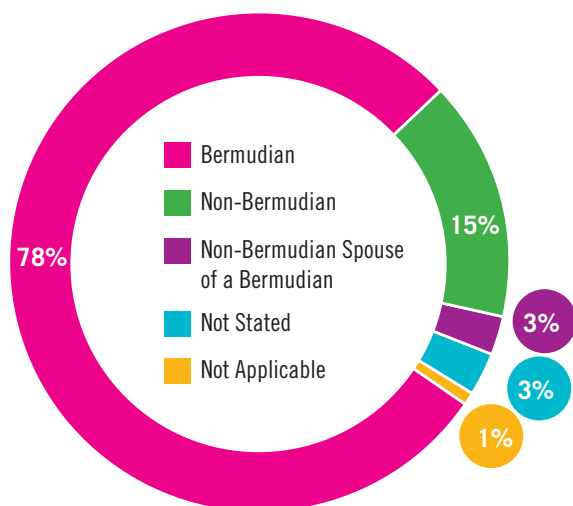
In 2017, one entity logged a complaint and for statistical purposes its gender has been identified as not applicable. The Human Rights Act 1981 (the “Act”) does not permit complaints to be lodged by groups or organisations, but before this detail could be discussed with the parties, the matter was withdrawn.

\* There was one intake that was reported to the Commission by an entity; therefore a gender has not been specified.



Figure 5.

# PERCENTAGE DISTRIBUTION OF INTAKES BY THE BERMUDIAN STATUS OF THE COMPLAINANT, 2017†

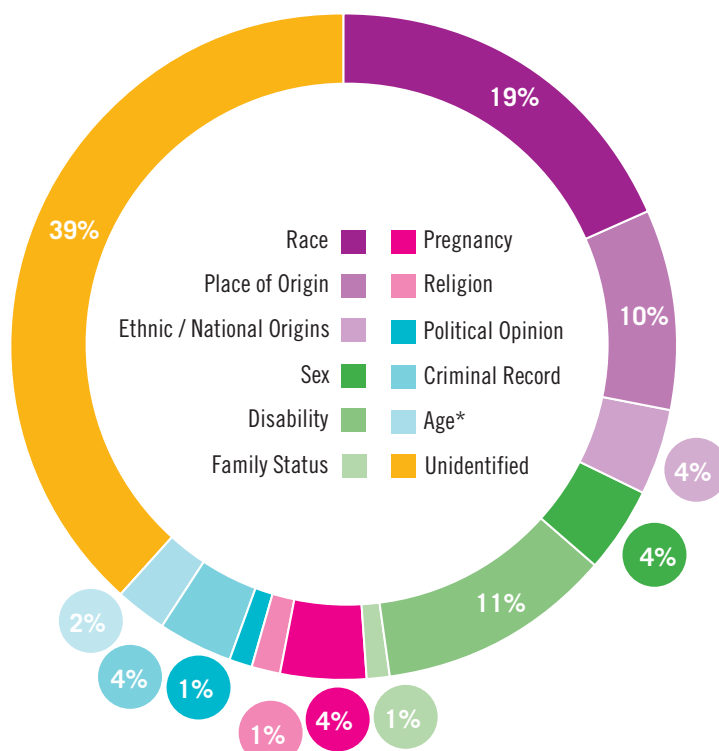


Bermudians represented 78% of the total number of Complainants in 2017. Persons who indicated they were non-Bermudian represented 15%, while non-Bermudian Spouses of Bermudians comprised 3% of intakes. The remaining Complainants did not identify their Bermudian status (3%). An entity contacted the Commission and that intake represented 1%.

† There was one intake that was reported to the Commission by an entity. It is recorded under Not Applicable.

Figure 6.

# PERCENTAGE DISTRIBUTION OF INTAKES BY GROUND OF DISCRIMINATION, 2017\*

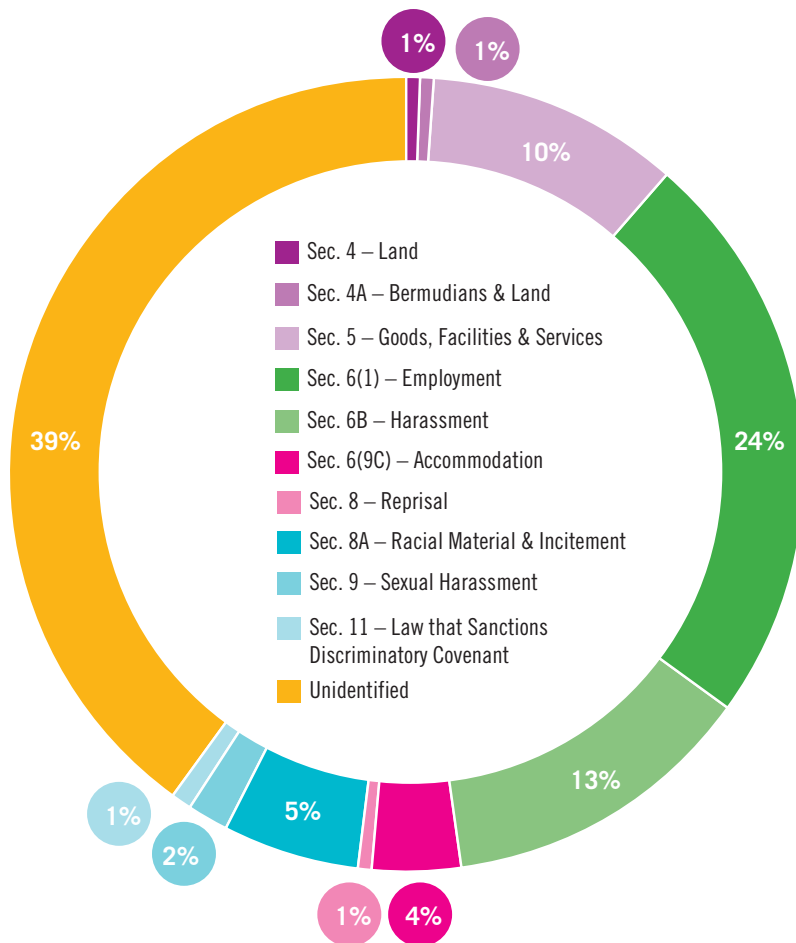


At 39%, the majority of Complainants that approached the Commission in 2017 did not identify a protected ground of discrimination for their human rights matters. However, intakes based on the protected ground of race represented the largest share of matters fielded by the Office in 2017 at 19%, followed by disability at 11% and place of origin at 10%. The remaining protected grounds, represented a combined total of 21% comprised of ethnic or national origins representing 4%, sex (4%), pregnancy (4%), criminal record (4%), age (2%), family status (1%), religion (1%) and Political Opinion (1%).

\* Protection afforded in Sec. 4 and Sec. 5

Figure 7.

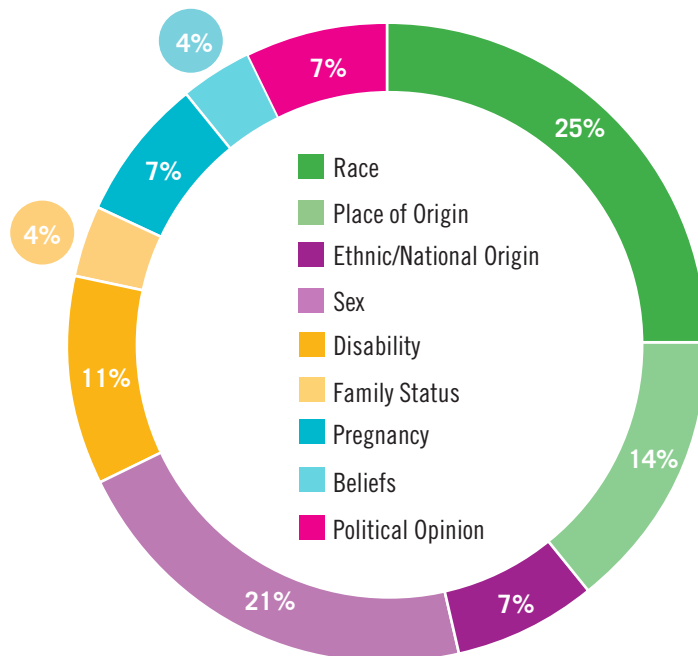
PERCENTAGE DISTRIBUTION OF INTAKES BY AREA OF DISCRIMINATION, 2017



At 39%, the majority of Complainants that approached the Commission in 2017 did not identify a protected area of discrimination for their human rights matters. Intakes based on the protected area of employment represented the largest share of matters where an area was identified at 24%. Harassment followed at 13% and the provision of goods, facilities and services at 10%. The remaining protected areas, represented a combined total of 15%.

Figure 8.

PERCENTAGE DISTRIBUTION OF ACTIVE INVESTIGATIONS BY GROUND OF DISCRIMINATION, 2017



There were 23 investigations being managed by Investigations Officers in 2017. Ten were approved for investigation in 2017 and 13 were approved in previous years and ongoing into 2017.

Race was identified as the ground of discrimination in 7 investigations, thereby being recorded as the main reason for complaints of discrimination and as figure 8 depicts resulting in a percentage share of 25%. This was followed by sex at 21% and place of origin at 14%.

It should be noted that for several investigations, Complainants alleged discrimination under multiple grounds.

Figure 9.

## PERCENTAGE DISTRIBUTION OF ACTIVE INVESTIGATIONS BY AREA OF DISCRIMINATION, 2017

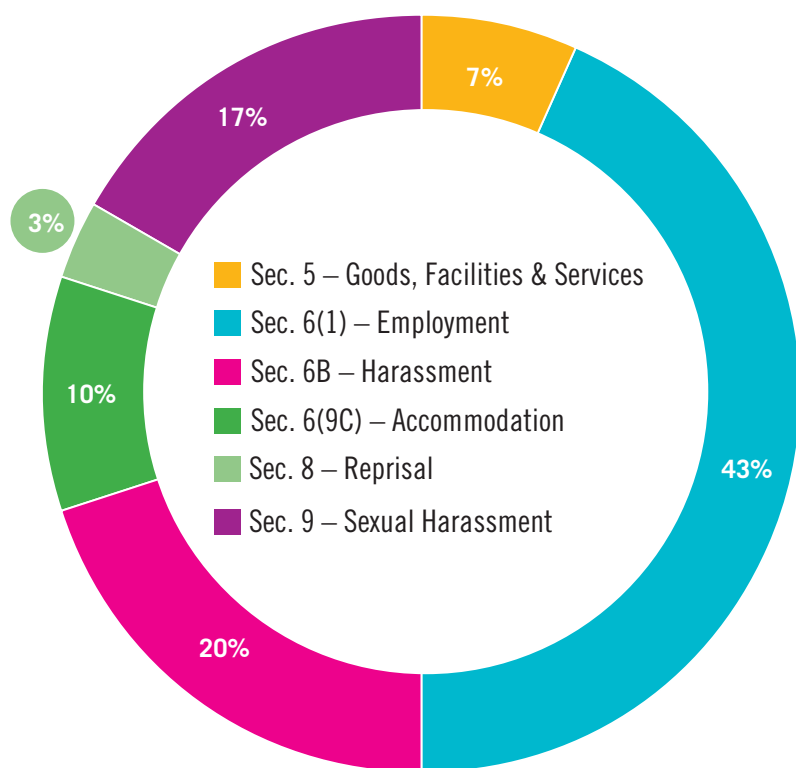


Figure 9 displays that most allegations of discrimination were identified as occurring in the area of employment at 43%. Thirteen Complainants alleged that they were the victims of discrimination in the workplace under section 6(1) of the Human Rights Act 1981 (the “Act”), citing such practices as unfair dismissal, difference in pay, failing to recruit etc.

Also alleged in the workplace, was harassment at 20%, sexual harassment at 17% and failure to accommodate a disability at 10%. One person (3%) also cited reprisal with regard to lodging a complaint and being terminated because of it.

Discrimination in the area of the provision of goods, facilities and services was cited in 7% of all investigations.

It should be noted that for a few investigations, Complainants alleged discrimination under multiple areas.

Table 1.

## CLOSED INVESTIGATIONS BY OUTCOME, 2017

**27%**  
COMPLAINT  
WITHDRAWN

**55%**  
COMPLAINT  
RESOLVED  
via Conciliation/  
Mediation

**0%**  
COMPLAINT  
DEEMED  
ABANDONED

**0%**  
COMPLAINT  
DISMISSED

**18%**  
COMPLAINT  
REFERRED  
to a Tribunal  
Hearing

About 55% of investigation closures during 2017 were resolved via conciliation or mediation efforts. Two (18%) progressed to a Tribunal hearing and three (27%) complaints were withdrawn by the Complainant. There were no investigations deemed abandoned and no investigations that were dismissed by the Executive Officer of the Human Rights Commission in 2017.

### Preliminary Inquiries

The Human Rights Act 1981 (the “Act”) under section 14I permits the Commission, for the purpose of determining whether to undertake an investigation, the power to conduct preliminary inquiries if considered appropriate. During the reporting period, twelve (12) preliminary inquiries were conducted with one (1) progressing to further investigation.

### Conciliation/Mediation

Fourteen (14) Complainants attempted conciliation in order to try to settle their complaints in 2017. Six (6) were successfully conciliated. Eight (8) were unsuccessful.

### Referrals to Other Agencies

The Human Rights Commission has a robust referral policy. In 2017, the majority of referrals were made to the Department of Workforce Development. Additional referrals were made to entities such as, the Bermuda Health Council, the Ombudsman of Bermuda, Immigration, the Community Centre on Angle Street for free limited legal advice – a service provided by Legal Aid, Women’s Resource Centre, the Bermuda Industrial Union, the Department of Social Insurance, Consumer Affairs, Aging & Disability Services, Rent Commission, the Department of Health and the Bermuda Bar Association to name but a few.

# TRIBUNAL DECISIONS AND LEGISLATIVE UPDATES

## TRIBUNAL CASE 1

**ZACQUAYA BUTTERFIELD (Complainant) v. QUINTON FRANCIS (First Respondent) and SAS PROTECTION SERVICES (Second Respondent)**

### TRIBUNAL DECISION

#### *Facts*

The Complainant was employed as a security officer by the Second Respondent, SAS Protection Services. The First Respondent, Quinton Francis, was a part owner of SAS Protection Services. Whilst at work, the First Respondent pinned down the Complainant, removed her shirt from her pants and grabbed her bra, exposing her left breast.

There were two complaints made to the Human Rights Commission, namely that:

1. The First Respondent discriminated against her by abusing a position of authority for the purpose of harassing her sexually in breach of Section 9(1) of the Act.
2. The Second Respondent discriminated against her by failing to take reasonable measures to ensure sexual harassment did not occur in the workplace in breach of Section 9(3) of the Act.

#### *Issues*

As the Respondents ultimately accepted liability, this left the fundamental issue for the Tribunal to determine the appropriate damages award for injury to the Complainant's feelings.

#### *Judgment*

The Tribunal accepted that the injury to her feelings was caused by the physical nature of the sexual harassment and was exacerbated by the lack of her employer's protocol in place to deal with sexual harassment complaints. The Tribunal found that the aggressiveness of the physical contact, the vulnerability of the Complainant and the lack of any protocol to deal with sexual harassment complaints justified a damages award of \$19,000.

Under Section 20(3) of the Act, the Tribunal has the power to order any party who has contravened the Act to do any act which constitutes full compliance with the provisions of the Act. The Tribunal exercised its discretion in this respect and ordered the Second Respondent to create a sexual harassment policy and protocol to deal with allegations of sexual harassment.

### WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This decision highlights to employers the importance of having the appropriate protocol in place to deal with sexual harassment complaints. This case is also significant in that it demonstrates the full scope of the Tribunal's powers under Section 20(1)(a) of the Act to order a party who has contravened the Act to do any act or thing to become compliant with the Act.

## TRIBUNAL CASE 2

**FANAYE BROADBELT (Complainant) v. BERMUDA ELECTRIC LIGHT COMPANY (First Respondent), DENTON WILLIAMS (Second Respondent) and JOCENE WADE-HARMON (Third Respondent)**

### TRIBUNAL DECISION

#### *Facts*

The Complainant was employed with the First Respondent, BELCO, until her employment was terminated for misappropriating funds. The Complainant filed a complaint with the Employment Tribunal that she was unfairly dismissed under the Employment Act 2000. The Employment Tribunal found that the Complainant had been fairly dismissed on the grounds of serious misconduct.

The complaint made to the Human Rights Commission was that the Respondents discriminated against her by dismissing, demoting or refusing to employ her on the basis of her sex in breach of the Act.

The Respondents applied to strike out the complaint on the grounds that the allegations of discrimination had already been determined by the Employment Tribunal and the facts in the human rights complaint were the same as the facts that were relied on before the Employment Tribunal to show that the dismissal of the Complainant was fair.

#### *Issues*

The Tribunal had to consider:

1. Whether the complaint had already been determined by the Employment Tribunal;
2. Whether the Tribunal has the power to dismiss a complaint for abuse of process; and,
3. If the Tribunal did have such power, whether the legal doctrine that prevented an issue from being re-litigated between the same parties (known as the doctrine of res judicata) applied to the case.

#### *Judgment - Issue 1*

The Tribunal found that the issues determined by the Employment Tribunal were the same as the issues in the Human Rights Complaint – addressing the fairness of the Complainant's dismissal. In reaching this decision, the Tribunal noted that the Employment Tribunal's ruling did not make any mention of section 28 of the Employment Act 2000 or the act of gender discrimination, however it would not be prudent for the Tribunal to conclude that the Employment Tribunal did not consider all of the issues put before them, including the extensive allegations of gender discrimination when reaching their decision that the Complainant was fairly dismissed due to serious misconduct.

## Judgment – Issue 2

The Tribunal found that under Section 20(6) of the Human Rights Act 1981, the Tribunal has very broad powers to dismiss a complaint at any stage of the proceedings.

## Judgment – Issue 3

The Tribunal found that the doctrine of *res judicata* means that a matter determined by a competent court may not subsequently be re-opened or challenged by the original parties. In order for the doctrine to apply, the parties must be the same, the issue must be the same, and the decision must be final.

Applying this test, the Tribunal then concluded that the First Respondent, BELCO, was the same party named in both the Employment Tribunal case and human rights complaint. Accordingly, the Tribunal determined that the doctrine of *res judicata* applied and dismissed the complaint against the company.

The Tribunal however found that the Second and Third Respondents were not parties to the Employment Tribunal case. Accordingly, the legal doctrine of *res judicata* did not apply to them and the Tribunal refused to grant the Second and Third Respondents' application to strike out the Complainant's complaint for abuse of process.

## WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This decision highlights that Tribunal may take into consideration whether there are any prior judgments or on-going proceedings in other forums which are set to determine or have determined the same matter involving the same parties. Where this is found to have occurred, the Tribunal may find that the doctrine of *res judicata* applies to the case and dismiss the complaint to prevent an abuse of the Tribunal's processes.

For further reading, see our summary of the decision of the Supreme Court of Bermuda following the Complainant's appeal against this decision at page 37.

## COURT CASE 1

**MINISTER OF HOME AFFAIRS (First Appellant), ATTORNEY GENERAL (Second Appellant) v. MICHAEL BARBOSA (Respondent)**

## COURT OF APPEAL

### Facts

The Respondent, Michael Barbosa, was successful in the Supreme Court however he ultimately lost in the Court of Appeal. The Appellants accordingly applied to the Court for their legal costs.

### Issue

The fundamental issue for the Court of Appeal in the costs hearing was whether a private citizen in constitutional cases should be subject to an order for costs, given that the general rule in civil litigation is that the losing party is responsible for the other party's costs.

## Judgment

The Court of Appeal found that in litigation between the Government of Bermuda and a private citizen who is seeking to assert a constitutional right if the Government wins then each party will be responsible for its own costs.

However, where a private citizen acts unreasonably in bringing their claim or conducts the proceedings in an unreasonable manner, then an unsuccessful private citizen may be ordered to pay the Government for the legal costs involved in defending the claim.

The Court of Appeal found that the Respondent had not acted unreasonably bringing the proceedings or unreasonably in connection with the manner in which those proceedings were conducted, and, accordingly, the Court of Appeal made no order for costs.

## WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This decision is significant in that it clarifies the position on costs in constitutional cases. If a private party brings a claim to assert a constitutional right, the Court may not require the unsuccessful private party to pay the government's reasonable legal costs in defending the claim.

However, the Court made it quite clear that there can be serious costs ramifications in the event the Court finds that the private party acted unreasonably bringing in the claim or in the conduct of the proceedings.

## COURT CASE 2

**ANDREA BATTISTON (Appellant) v. PERNELL GRANT (Respondent)**

## COURT OF APPEAL

### Facts – Complaint and Tribunal Decision

The Respondent, Pernel Grant, was employed as a construction worker and a carpenter by trade by Apex Construction Management Ltd. (Apex) prior to his termination for poor performance.

The Respondent filed a complaint against (i) Apex; (ii) the operations manager for Apex at all material times, Andrea Battiston; and (iii) the site superintendent for Apex at all material times, Kevin Mason.

This complaint stated that Apex and its senior management had discriminated against him on the basis of his national origin and/or place of origin contrary to the provisions of the Act by providing a special term and/or condition of employment because he was Bermudian, in contravention of Section 6(1)(g) as read with Section 2(2)(a)(i) of the Act by:

1. offering employment on terms less favourable than the terms offered to others, and those others consisted of groups of Polish and Canadian contract workers;
2. denying him the opportunity to work overtime; and
3. causing him to suffer reprisals in the nature of 'staged' (or false) complaints in order to justify the termination of his employment with Apex.

The former Board of Inquiry (predecessor of the Human Rights Tribunal) found that black Bermudians were placed on the construction site in order to support Apex's claims for work permits for contract workers and that black Bermudians were employed by Apex with no real prospect of advancement or training in contravention of:

- Section 6(1)(c) of the Act (namely the refusal to train, promote or transfer an employee); and
- Section 6(1)(f) of the Act (namely, the maintenance of separate lines of progression for advancement in employment or separate seniority lists based upon protected characteristics where the maintenance will adversely affect any employee)

Following the Notice of Appeal, the Chief Justice had struck out the appeal as against Apex because the company had by then ceased to exist and had been struck off the Register of Companies.

On the basis of a concession made at the trial of the preliminary issue, Kevin Mason's appeal had been allowed and the proceedings were allowed to continue as between Andrea Battiston, as Appellant, and Pernell Grant, as Respondent.

### ***Facts – Decision of the Supreme Court***

On appeal, the Supreme Court considered whether the Appellant had been deprived of a fair hearing by the Board of Inquiry finding him liable for a form of discrimination that did not form the basis of the Respondent's complaint. The Court found that no substantial injustice flowed from the Tribunal's decision because there were valid grounds to find that the Respondent had been treated less favourably on the basis of his place of origin.

The Appellant appealed against this decision to the Court of Appeal.

### ***Issue for the Court of Appeal***

The Court of Appeal was required to determine:

1. Whether the Board of Inquiry's finding of discrimination Whether the Board of Inquiry's finding of discrimination Rights Act formed the basis of the Respondent's complaint; and
2. Whether the Supreme Court was in a position to find the Appellant liable for discrimination which was different from the discrimination that formed the basis of the Respondent's complaint.

### ***Judgment***

The Court of Appeal determined that the Tribunal's finding of discrimination under Section 6(1)(c) and (f) of the Act did not form the basis of the Respondent's complaint.

The Court of Appeal found that the Supreme Court was not in a position to find the Appellant liable for discrimination which was different from the discrimination that formed the basis of the Respondent's complaint.

## **WHAT THIS MEANS FOR RESIDENTS OF BERMUDA**

This decision overturned the Court's decision to affirm the finding of the Board of Inquiry that the Respondent had been subject to "systematic discrimination" which did not form the basis of his complaint before the Board.

This decision is significant in that a party bringing a claim before the Human Rights Tribunal must ensure the other party is given proper notice and an opportunity to defend the claim.

## **COURT CASE 3**

**AYO KIMATHI (First Applicant) and DAVID TUCKER (Second Applicant) v. ATTORNEY GENERAL FOR BERMUDA (First Respondent), MINISTER OF HOME AFFAIRS (Second Respondent) and EXECUTIVE OFFICER OF THE HUMAN RIGHTS COMMISSION (Third Respondent)**

### **SUPREME COURT – SUBSTANTIVE DECISION**

#### ***Facts***

The Second Applicant, David Tucker, organised a lecture series called 'African History and Culture Come Alive' and obtained a work permit for the First Applicant, Ayo Kimathi, an African American, to give a lecture. During the public lecture, the First Applicant made derogatory and offensive statements about persons of European descent and homosexuals. In a newspaper article published after his lecture, the First Applicant's statements were characterised as "hate speech".

Following the newspaper article, the Second Respondent, the Minister of Home Affairs, placed the First Applicant on the stop list and a complaint was filed with the Human Rights Commission against the Applicants in relation to the same statements. The complaint was formalised by the Third Respondent, the Executive Officer of the Human Rights Commission, who afforded the Applicants an opportunity to respond to the allegations made against them.

The Applicants' counsel asserted that the complaint interfered with his clients' constitutional rights, that no arguable breach of the Human Rights Act, 1981 was disclosed on the face of the complaint and declined to engage with the mediation requests of the Third Respondent. In due course, the Third Respondent notified the Applicants that the complaint had been referred to the Chairman of the Commission for adjudication by a Tribunal on its merits but that it was still possible to resolve the matter through mediation.



The Applicants sought leave from the Supreme Court to seek judicial review of the Second Respondent's decision to place the First Applicant on the stop list and the Third Respondent's decision to investigate and refer the complaint to the Tribunal. The Supreme Court granted leave to seek judicial review and stayed the human rights complaint.

### ***Judgment on the Main Issues***

The Supreme Court had to consider:

#### ***Issue 1: Interference with the Applicants' freedom of expression rights under Section 9(1) of the Bermuda Constitution***

The Court determined that the Second Respondent had interfered with the Applicants' freedom of expression rights under Section 9(1) of the Bermuda Constitution.

#### ***Issue 2: Interference with the Applicants' freedom of conscience rights under Section 8(1) of the Bermuda Constitution***

The Court determined that the Second Respondent had interfered with the Applicants' freedom of expression rights under Section 8(1) of the Bermuda Constitution.

#### ***Issue 3: Justified and Proportionate Interference by the Second Respondent***

In constitutional cases, the State has the burden to establish that the aim of the interference was proportionate to the means. The Court concluded that preventing hate speech was a legitimate public policy aim justifying proportionate interference with an individual's free speech rights under the Bermuda Constitution.

Interference with freedom of conscience rights can be justified on the same grounds relied upon in relation to freedom of expression as an individual's right to publicly express their beliefs in public is subject to public interest restraints.

#### ***Issue 4: Whether the threshold for "hate speech" was met***

The First Applicant's comments targeted people of European descent and homosexuals and encouraged Bermudians of African descent to pursue a separatist economic and social agenda. The Court had little difficulty concluding that these remarks amounted to 'hate speech'.

#### ***Issue 5: Could the classification of the statements as "hate speech" cause those statements to fall outside of the protection established in the Bermuda Constitution***

The Bermuda Constitution and the Human Rights Act, 1981 prohibit discrimination on the basis of race and/or sexual orientation. The Court found that there is no constitutionally protected right to publicly express beliefs amounting to 'hate speech' that undermines the rights and freedoms of others. Accordingly, the First Applicant's statements were unprotected 'hate speech' and not protected by the guarantees for freedom of expression and/or conscience under the Bermuda Constitution.

### ***Judgment on Court Applications***

The Application to quash the decision of the Third Respondent to investigate and refer the complaint to the Tribunal was refused. The complaint on its face did disclose a potentially valid

case that the First Applicant's comments were unprotected 'hate speech' intended to and likely to promote hatred or discrimination against protected groups in contravention of Section 8(1)(b) of the Human Rights Act.

The Application to quash the decision of the Third Respondent to refer the complaint against the Second Applicant to the Tribunal is granted. The complaint that the Second Applicant's general support for the First Applicant at the close of his lecture does not support a finding that the Second Applicant had used words of 'hate speech'.

### ***Judgment on Costs***

Following the substantive hearing and subsequent judgment dated 28th April 2017 the parties were heard on costs. The Court following the guidance laid down in *Minister of Home Affairs v Barbosa* (as summarised on page 31), found the unsuccessful applicants had acted reasonably pursuing their claim and had not conducted the proceedings in an unreasonable manner. Accordingly, the Court made no order for costs.

## **WHAT THIS MEANS FOR RESIDENTS OF BERMUDA**

This decision highlights that the freedom of expression and conscience rights enshrined in the Bermuda Constitution are not absolute. The Bermuda Constitution permits the Government to interfere with an individual's freedom of speech rights only where the interference is reasonable and in the public interest.

This court case, being the first of its kind in Bermuda, raised difficult questions about the limits of free speech in relation to public debate or "political speech" in the post 1968 Constitution era. In reaching a determination, the Chief Justice expressed his view that the "Court must strain every sinew to effectively hear and understand all legal and cultural perspectives".

While it remains a mission of the Bermuda Constitution to attack modern manifestations of historic racial discrimination there is also the need to suppress, with equal vigour, new manifestations of discrimination as well. Moreover, the free speech rights established by the Constitution carry with them corresponding duties and responsibilities because these rights can only be exercised in a way that does not prejudice the rights and freedoms of other people or the public interest.

In reaching its decision, the Court determined that "hate speech" was a legitimate public interest concern and considered the forms of injury caused by hate propaganda, namely:

- Harm done to members of the target group: Emotional damage suffered by individuals could be of grave psychological and social consequence and cause humiliation and degradation. As a person's sense of human dignity and belonging is closely linked to the concern and respect given by society to the groups that a person belongs to, hate propaganda can have a severely negative impact on an individual's sense of self-worth and acceptance.

- Harmful influence upon society at large: It is not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause and, in the process, create serious discord between various cultural groups in society. The success of modern advertising and the triumphs of the propaganda of Hitler's era have sharply qualified our belief in the rationality of men. We know that under strain and pressure and in times of irritation and frustration, we can act irresponsibly if we ignore the way in which emotion can drive away reason. Moreover, even if a message of hate propaganda is outwardly rejected, there is evidence that the concept of racial or religious inferiority may remain in the recipient's mind as an idea that holds some truth and cannot be entirely discounted.

Within this vein, the Court considered the Applicants' propaganda which associated one entire racial group as being morally reprehensible, engaged in attacks amounting to the genocide of another racial group, advocated for what amounted to a black-led form of segregation and suggested that persons of African descent should shun homosexuals, even their own children) and determined that it had crossed the line, having regard to the pluralist nature of Bermuda's modern Constitutional mission.

Notwithstanding the detailed analysis within the judgment on the operation of the Bermuda Constitution and the Human Rights Act 1981, the decision was considering a specific factual scenario. Accordingly, Bermuda will require further decisions from the Courts to have a definitive view on the limitations of the right to freedom of expression and conscience.

**AYO KIMATHI (First Applicant) and DAVID TUCKER (Second Applicant)  
v. ATTORNEY GENERAL FOR BERMUDA (First Respondent), MINISTER  
OF HOME AFFAIRS (Second Respondent) and EXECUTIVE OFFICER  
OF THE HUMAN RIGHTS COMMISSION (Third Respondent)**

## SUPREME COURT – APPLICATION FOR SECURITY FOR COSTS

### Facts

The Appellants filed a Notice of Appeal against the decision reached by the Supreme Court and the Respondents applied for security for costs in respect of the prosecution of the appeal.

Initially, the Registrar followed *Minister of Home Affairs v Barbosa* (as summarised above at page 31) and declined to make a security for costs order against the Appellants on the basis that the appeal involved a case of wide public and constitutional importance and the Appellants were unsuccessful private parties who were seeking to assert a non-frivolous constitutional claim. Instead, the Registrar gave directions to the parties in connection with the appeal with respect to payment of court fees, the filing of the Appellants' and Respondents' submissions and the preparation of a joint authorities' bundle.

The Appellants, however, failed to comply with the Registrar's directions and this failure necessitated the parties appearing before the Registrar at a second hearing. Counsel for the Appellants then applied for an adjournment of the appeal and failed to appear in person at the hearing. Notwithstanding his absence, the Registrar declined to adjourn the appeal and the hearing in respect of the Appellants' non-compliance with the Registrar's order for directions went ahead as scheduled. The Respondents revived their request for an order for security for costs based on the deficiencies in the prosecution of the Appellants' appeal.

### Issue

The Registrar was required to consider whether a private party could lose the benefit of *Barbosa* protection as a result of their conduct of their case.

### Judgment

The Registrar found that the Appellants had lost their *Barbosa* protection due to the manner in which the Appellants had conducted the appeal.

The Registrar made an order for security for costs for the due prosecution of the appeal to be measured against a wasted costs order. Further contemplating the estimated costs to pursue the overseas First Appellant, the Registrar ordered that the commensurate sum in security be \$5,000.00.

## WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

This decision highlights to residents of Bermuda that the protection to be afforded against a security for costs order when private citizens are seeking to assert constitutional claims is not absolute. The rule establishing such protection is not an inflexible principle which the Courts will follow blindly. Instead, the Courts will take into consideration a private party's conduct through the entire set of court proceedings. *Barbosa* protection which is afforded at the start of a court proceeding can be subsequently lost if the Court decides that there has been a flagrant failure to comply with a Court order and the party's conduct deserves censure.



**AYO KIMATHI (First Appellant) and DAVID TUCKER (Second Appellant) v ATTORNEY GENERAL FOR BERMUDA (First Respondent), MINISTER OF HOME AFFAIRS (Second Respondent) and THE EXECUTIVE OFFICER OF THE HUMAN RIGHTS COMMISSION (Third Respondent)**

**COURT OF APPEAL – APPLICATION FOR WASTED COSTS**

**Facts**

The Appellants, Ayo Kimathi and David Tucker, and their Counsel failed to attend the Court of Appeal for the hearing of their appeal. In the absence of the Appellants, the Court scheduled a second hearing for the appeal. The Court further ordered that unless security for costs were provided and a skeleton argument was filed by a certain date, the appeal would be struck out and, in that eventuality, the Court would hear any application for costs, including a wasted costs order.

On the date of the second hearing, the Appellants had failed to adhere to these orders and the Court of Appeal adjourned the hearing to a later date to enable Counsel for the Appellants to prepare his firm's response and enable the Second Appellant to obtain fresh legal representation.

**Issues**

Upon reconvening the hearing, the Court of Appeal was required to consider:

1. What was the general approach of the Court of Appeal in respect of ordering costs in constitutional cases;
2. Whether the Court of Appeal had the jurisdiction to make a wasted costs order; and
3. Whether a wasted costs order was appropriate due to the conduct of Counsel for the Appellant in the prosecution of the appeal.

**Judgment – Issue 1**

The Court of Appeal considered *Minister of Home Affairs v Barbosa* (as summarised on page 31) where the Lord President of the Court had endorsed the “rule of thumb” that, generally, an unsuccessful claimant will not be ordered to pay the successful defendant's costs.

In respect of the application of this “rule of thumb”, the Lord President had expressly stated that the general rule should not be applied blindly and that aspects of individual cases could justify a departure from the general rule. Accordingly, in the end, the court has to make a just order according to the facts of the case.

**Judgment – Issue 2**

The Court of Appeal determined that it did have the jurisdiction to make a wasted costs order, subject to compliance with procedural safeguards and the satisfaction of the applicable substantive criteria.

This power emanated both from the inherent jurisdiction of the Court of Appeal and the procedural provisions applicable to the Court of Appeal under the Court of Appeal Act 1964 and, potentially, also the Rules of the Court of Appeal.

**Judgment – Issue 3**

The Court of Appeal determined that the history and outcome of the appeal placed it outside of the ambit of the “rule of thumb” that generally, an unsuccessful claimant will not be ordered to pay the successful defendant's costs. The Court further determined that the criteria for making a wasted costs orders had been plainly met. The Respondents had been put to considerable expense after the appellate proceedings commenced however the appeal had come to nothing due to procedural non-compliance on the part of the Appellants. This was despite the Appellants having the option of abandoning the appeal and saving the Respondents from incurring further costs.

At the commencement of the appeal, it was clear that the Appellants had the protection of Barbosa however even before Counsel for the Appellants encountered professional difficulties with his practicing certificate, the appeal was not pursued with proper diligence.

Moreover, Counsel for the Appellants failed to comply with directions and had been warned that an application to set aside the appeal and a wasted costs order would be made. Notwithstanding his professional difficulties, Counsel for the Appellants attorney did not come off the record as acting to the Appellants or instruct alternative representation for his clients.

As a result of this conduct, the Appellants were left without legal representation and the Respondents were forced to continue their preparation for an appeal that was ultimately set aside. The Court held that, even without invading the legal privilege of his clients, the attorney's conduct was unreasonable and improper and made a wasted costs order.

**WHAT THIS MEANS FOR RESIDENTS OF BERMUDA**

This is a clear indication that non-compliance with directions and/or orders of the Court can have significant cost ramifications for an Applicant and/or the Applicant's attorney. Specifically, if a party unreasonably pursues his claim or conducts the proceedings the party will lose Barbosa protection (i.e. an unsuccessful party asserting a constitutional right will not be responsible for the costs of the Government of Bermuda).

## COURT CASE 4

**WINSTON GODWIN (First Applicant) and GREG DEROCHÉ (Second Applicant) v. REGISTRAR GENERAL (First Respondent), ATTORNEY GENERAL (Second Respondent), MINISTER OF HOME AFFAIRS (Third Respondent), HUMAN RIGHTS COMMISSION (First Intervener) and PRESERVE MARRIAGE BERMUDA LIMITED (Second Intervener)**

### **Facts**

The First Applicant and Second Applicant were a same sex couple who wanted to be married in Bermuda. The Applicants filed a Notice of Intended Marriage to the First Respondent, the Registrar General, with the appropriate fee in accordance with the Marriage Act, 1944. The First Respondent refused to issue a marriage licence on the grounds that the marriage was void because the parties were not male and female. The Applicants applied for judicial review of the First Respondent's decision to refuse to process the marriage application in accordance with Section 13 of the Marriage Act.

### **Issues**

The Supreme Court had to consider:

1. What was the definition of common law marriage, in the absence of a statutory definition for marriage, and how did that definition apply to the Marriage Act;
2. Whether the application of the common law definition of marriage operated in breach of Section 2(2)(a)(ii) of the Act;
3. Whether the Registrar performs “services” within the meaning of Section 5 of the Act so that the Registrar's refusal to process the marriage application was in breach of the Act; and
4. Whether the Registrar had discriminated against the Applicants

### **Judgment – Issue 1**

The common law definition of marriage is that a marriage is a voluntary union between a man and a woman for life. The Court found that the common law definition of marriage as it applies to the provisions of the Marriage Act operates as a bar to same sex marriage.

### **Judgment – Issue 2**

Section 2(2)(a)(ii) of the Act prohibits discrimination on the basis of race, place of origin, ethnic or national origin, sexual orientation, disability, family status and religion. The Court held that the common law definition of marriage excluded same sex couples and denied the equal benefit of marriage available to couple of the opposite sex on the basis of sexual orientation in breach of Section 2(2)(a)(ii) of the Act.

### **Judgment – Issue 3**

The Court then considered whether the First Respondent, the Registrar, performed “services” within the meaning of Section 5 of the Act. The Court found that the administrative functions carried out by the First Respondent (i.e. issuing a marriage licence) amounted to “services” under Section 5 of the Act.

As the administrative functions of the Registrar fell within the scope of Section 5 of the Act, the First Respondent's refusal to

process the Notice of Intended Marriage filed by the Applicants on the basis of the Applicants' sexual orientation amounted to discrimination in contravention of Section 5 as read with Section 2(2)(a)(ii) of the Act.

### **Judgment – Costs**

Following the substantive hearing and judgment, the parties were heard on issues related to the final order and costs arising out of the judicial review hearing.

The Respondents contended that Section 29 of the Act only permitted a court to declare provisions of law inoperative. The Court following *A and B* and *Bermuda Bred* in determining that under Section 29 of the Act the Court does not have the authority to reformulate provisions of law and should simply make an order that the offending provisions of law are inoperative.

The Applicants and the First Intervener applied to the court for costs.

The Court considered the following issues with respect to costs:

- i. costs in a public interest case;
- ii. costs awarded to and against interveners;
- iii. costs of constitutional arguments; and
- iv. indemnity costs.

In civil litigation the general rule of costs is that costs follow the event. In public interest cases, the general costs rule will apply unless exceptional circumstances apply. In this case, the Court found that there were no exceptional circumstances and held that costs will follow the event.

The Respondents contended that they should not be liable for any costs associated with the constitutional arguments on the grounds that the arguments did not assist the Court. The Court found that the constitutional arguments could be treated separately and no cost order would be made in favour of the First Intervener.

The Court then considered whether costs could be awarded to or against interveners. The Court, after considering the relevant authorities, determined that an award of costs can be awarded to or against an intervener. The Court found that the substance of the Second Intervener's submissions did not assist the court and, on these grounds, the Second Intervener was subject to an order for costs.

Indemnity costs are awarded if they are the result of unreasonable conduct of the losing party. The Court found that the Respondent failed to distinguish the interpretation of “services” which had already been settled by the Court in *Bermuda Bred*. In the circumstances the Court made an order for costs paid by the Respondents on an indemnity basis.

### **WHAT THIS MEANS FOR RESIDENTS OF BERMUDA**

Following this judgment, the Legislature passed the Domestic Partnership Act 2018. The Domestic Partnership Act permits same sex adult couples to enter into a legally recognised relationship. Domestic Partnerships extend legal rights and benefits to same sex couples that had previously only been available to heterosexual couples.

## COURT CASE 5

**FANAYE BROADBELT (Appellant) v. BERMUDA ELECTRIC LIGHT COMPANY (First Respondent), DENTON WILLIAMS (Second Respondent) and JOCENE WADE-HARMON (Third Respondent)**

### SUPREME COURT

#### Facts

The Appellant, Fanaye Broadbelt, appealed against:

1. a decision of the Employment Tribunal to dismiss her complaint alleging unfair dismissal; and
2. a decision of the Human Rights Tribunal to summarily dismiss her discrimination complaint at a preliminary hearing.

#### Issues

The Supreme Court had to consider:

1. Whether the Employment Tribunal had applied the proper legal test and had properly considered all aspects of the complaint to support their finding that the dismissal from employment was fair;
2. Whether the appeal against the Employment Tribunal decision should be allowed;
3. Whether the Human Rights Tribunal had the jurisdiction to dismiss a complaint based on the legal doctrine that prevented an issue from being re-litigated between the same parties (the doctrine of *res judicata*); and
4. Whether the Human Rights Tribunal was correct to dismiss the complaint on *res judicata* grounds.

#### Judgment – Issue 1

The Court determined that although the Employment Tribunal had applied the proper legal test, it had failed to consider that part of the Appellant's complaint which alleged that the decision to terminate her employment was discriminatory on the basis of her sex.

#### Judgment – Issue 2

The Court was satisfied that the Employment Tribunal's decision could be set aside due to the above-mentioned failure. Notwithstanding this, the Court declined to allow the appeal against the Employment Tribunal's decision on the grounds that the discrimination claim should be heard by the Human Rights Tribunal.

#### Judgment – Issue 3

The Court found that the Tribunal under Section 20(6) of the Human Rights Act, 1981 has the broad power to dismiss a complaint at any stage of the proceedings however reached no conclusive view on whether the Tribunal had the jurisdiction to dismiss a human rights complaint on *res judicata* grounds, before it was fully heard.

#### Judgment – Issue 4

The Court found that the facts in this specific case did not support a finding of dismissing the complaint on *res judicata* grounds because the record was clear that the Appellant's discrimination complaint was neither an issue that had been decided by the Employment Tribunal nor an issue that was not raised by the Appellant before the Employment Tribunal.

The Court allowed the appeal against the Human Rights Tribunal's decision to dismiss the Appellant's complaint on *res judicata* grounds.

### WHAT THIS MEANS FOR RESIDENTS OF BERMUDA

In reviewing the Tribunal's decision, the Supreme Court of Bermuda confirmed that, as a statutory tribunal, the Tribunal's mandate was to promote and protect human rights through "citizen-friendly" proceedings. Accordingly, it was only in the clearest of cases that the Tribunal should dismiss proceedings at the preliminary stage, whether on *res judicata* grounds or on other grounds.

This decision provides assurance to Bermuda residents that human rights complaints will only be struck out at the preliminary stage in very limited circumstances.

## Tribunal Statistical Highlights



The Executive Officer referred a total of **two (2) complaints deemed to have merit** to the Chair in 2017 for adjudication.

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**Eight (8) active complaints** which had been referred for adjudication **were carried over from 2016**.

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**Five (5) parties to a complaint were offered mediation** through the Commission's Voluntary Mediation Program in 2017 in an effort to resolve their complaints before a Tribunal Hearing was held. **Two (2) declined** the mediation offer. **Three (3) accepted** the mediation offer and participated in mediation. **Two (2) were successfully resolved** in mediation. **One (1) complaint remained in mediation** at time of this report.

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A variety of hearings were held including **three (3) Directions Hearings, one (1) Case Meeting and one (1) Tribunal**.

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**No complaint that had been referred for adjudication was withdrawn** during the period.

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**No complaint that had been referred for adjudication was dismissed** during the period in its entirety. *There was one matter where, during the preliminary hearing, the case against one of the three respondents was dismissed. That decision was overturned on appeal to the Supreme Court and the complaint against the three respondents will be heard.*

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The remaining **four (4) complaints referred for Tribunals remained active at the end of the year** due to various scheduling issues and are expected to resume in 2018.

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**One (1) Tribunal judgment was appealed to the Supreme Court in 2017.**

## SUMMARY OF LEGISLATIVE UPDATES

### BERMUDA IMMIGRATION AND PROTECTION ACT 1956

In October 2017, the Bermuda Immigration and Protection Amendment (No. 2) Act was tabled in the House of Assembly.

The Bill sought to amend both the Bermuda Immigration and Protection Act 1956 and Schedule 2 to the Human Rights Act 1981 to ensure the supremacy of Bermuda's immigration legislation over the Human Rights Act. In essence, this meant that the Bill sought to exempt the Bermuda Immigration and Protection Act 1956 from the primacy of the Human Rights Act 1981. The Bill was debated against a backdrop of the decision issued by the Supreme Court of Bermuda in *Marco Tavares and Paula Tavares v The Minister of Home Affairs* and others which gave the applicant (who was born in Bermuda but did not possess Bermudian status) the right to work in the jurisdiction without a work permit.

The Government of Bermuda championed the legislative changes as ensuring that Bermudians would come first. In this respect, the Government stated that the fundamental tenets of the Bermuda Immigration and Protection Act 1956— which the Government asserted was to protect Bermuda for Bermudians— had been challenged and continued to be challenged due to the primacy of the Human Rights Act 1981. This had caused persons not possessing Bermudian status to claim that they were being discriminated against based on their place of origin.

Public awareness of the proposed amendment sparked wide debate, both locally and internationally. The Human Rights Commission released a statement on the 10th of October 2017 to voice concern over the Government's failure to provide an inclusive consultation process and its proposed amendments intending to exempt the entirety of Bermuda's immigration legislation from the Human Rights Act.

Despite calls for further consideration to be given to the legislative amendments, these changes were brought into force on the 7th of November 2017.

### **DOMESTIC PARTNERSHIP ACT 2018**

The Domestic Partnership Act was introduced following the Supreme Court's 2017 decision in *Winston Godwin and Greg Deroche v The Registrar General* and others (summarised on page 36) which determined that the Court should develop the Common Law by giving effect to the will of Parliament, as expressed in the Human Rights Act 1981, and upheld the right to same-sex marriage.

Following the tabling of the proposed legislation, the Human Rights Commission issued a statement in November 2017 to express disappointment that the proposed legislation had been introduced after case law on same sex marriage had been settled in Bermuda. The Commission expressly noted that it was a de facto removal of rights from same sex couples by relegating their unions to a separate category which might not be recognised abroad.

Notwithstanding this, the Legislature passed the Domestic Partnership Act 2018 which came into force on 1st of June 2018.

Section 48 of the Domestic Partnership Act expressly states that Section 15(c) of the Matrimonial Causes Act 1974 which provides a marriage is void unless the parties are male and female shall have effect notwithstanding contrary provisions of the Human Rights Act 1981.



## SAMPLE COMPLAINTS LODGED

**The following examples of complaints of discrimination were brought to the attention of the Executive Officer through the year.** In order to preserve confidentiality, identifying information was omitted from each complaint.

A

### Based on RACE

A Complainant came to the Human Rights Commission alleging discrimination based on their race. They claimed harassment in the workplace indicating that a co-worker of another ethnicity called them a derogatory name at their place of employment with regard to their race. The Complainant stated that they approached Management concerning this incident and others, but nothing was done to address the comment or the co-worker's behaviour, Management also verbalised that they did not believe that the co-worker conducted themselves in that manner. The Executive Officer determined that the complaint appeared genuine and approved it for investigation. Before the matter could be investigated, the Complainant withdrew the complaint indicating that the parties had come to a settlement agreement outside the offices of the Human Rights Commission.

B

### Based on DISABILITY

A Complainant claimed harassment and lack of accommodation at their place of employment for a mental health impairment. The Complainant alleged that they made their employers aware of their mental health impairment, namely bouts of anxiety and depression. The Complainant also indicated how they felt harassed by co-workers and Management for reasons that they alleged were inconsequential and only aggravated their condition. The Complainant alleged that when they reported their concerns to Management, they did not offer any accommodation options to them and dismissed their claims of feeling marginalised in the workplace. The office of the Human Rights Commission thoroughly vetted the circumstances of the complaint including conducting inquiries. The Executive Officer determined that the Complainant had not had a discussion with their employer or provided their employer with certification from their doctor formalising their condition and thereby giving the employer an opportunity to consider accommodation options. The Executive Officer also determined that there was no evidence that the Human Rights Act 1981 had been violated.



**C**

## Based on PLACE OF ORIGIN

A Bermudian contacted the Human Rights Commission alleging a difference in treatment from their employer in comparison to non-Bermudian members of staff. The Complainant indicated that they were suspended by their employer based on an allegation of speaking to a non-Bermudian staff member in a confrontational manner. The Complainant denied that they spoke to the other member of staff in a confrontational manner indicating that they knew of non-Bermudian staff members that did not conduct themselves appropriately in the workplace and even had customer complaints but were not suspended like they had been. The Complainant therefore alleged a difference in treatment. The Complainant was terminated after an investigation was conducted into the incident. As a result of their allegations, a preliminary inquiry was conducted, but the result was that the Commission learned that the Complainant's behaviour in the workplace had been less than stellar as evidenced in performance documentation. The Manager contacted cautioned previous verbal warnings and a suspension the year before because of a customer complaint regarding the Complainant's conduct. The Manager further stated that the investigation into the incident with the non-Bermudian was viewed on camera and another co-worker provided a statement supporting that the Complainant approached the staff member aggressively. Based on this information, the Executive Officer determined that there was no evidence that the Human Rights Act 1981 had been violated and closed the complaint.

**D**

## Based on PREGNANCY

A Complainant alleged discrimination in the area of employment based on the protected grounds of sex because she was pregnant. A Bermudian female indicated that she had been employed as a part time worker for a number of years and noticed that others that were being employed after her for the same job were being offered full time contracts of employment while she still remained on a part time contract. She stated that she had made her employer aware on numerous occasions that she wanted to be employed full time but he never gave her the option. She became pregnant and once again approached her employer about full time employment because she wanted to ensure that she had a job on her return from maternity leave and equally that she would be afforded the benefits associated with full time employment. She alleged that her employer only offered her full-time employment once she returned to work after having her baby. The Executive Officer determined that the complaint appeared genuine and approved it for investigation. Before the matter could be investigated, the Complainant withdrew the complaint indicating that she would check back with her employer once she had her baby and if he rescinded the offer for full time employment, she would contact the Commission and make a complaint. Her matter was therefore closed due to the withdrawal.

**E**

## Based on AGE

A Complainant called on behalf of her teenaged son. She alleged that he had been discriminated against in the workplace by his employer due to his age. The Complainant indicated that her son was suspended from his job on a suspicion of theft but on his return to work with no evidence to support that allegation, he was later terminated by his Manager for abandoning the job. The Complainant indicated that she believes her son was taken advantage of because he is a young man and did not know his rights. Based on the information provided, the Executive Officer determined that there was no evidence that the Human Rights Act 1981 had been violated and closed the complaint. The Complainant was also informed that age was not a protected ground of discrimination in the area of employment.

## CHARTING THE COURSE FOR 2018



**THE HUMAN RIGHTS COMMISSION** appreciates the opportunity to reflect on the full spectrum of challenges and successes that comprised engagements in 2017. Part of what makes this work relevant, is the commitment to continually evaluate and be responsive to the changing needs of the community, and the diverse and varied stakeholders within it.

2018 will be focused on increasing access to, and awareness of, human rights protections and representation. The desire is for human rights

matters to be part of the dialogue in our homes, schools and work environments to help foster a culture committed to honouring these rights in daily lives. We wish to see an expanded awareness of Bermuda's human rights framework, and a national commitment to embedding these considerations into the development of Bermuda's policies and legislation. We are hopeful that increased presence on various multimedia platforms will aid the transfer of human rights principles into the everyday practice and behaviours of public, private and voluntary institutions.

For the Commission, the launching of an independent website will allow for greater access and distribution of human rights materials, and will serve as a repository for rights related information including Tribunal decisions, research, practical applications, and legal summaries. This focus coincides with the Government of Bermuda's "100-day Pledge" to install Wi-Fi in public schools, allowing for greater exploration and understanding of rights issues in Bermuda and the wider world, and we look forward to being part of bringing rights to life in schools across the island.



Resource development is already underway at the Commission for 2018 to ensure accessible materials to aid the Bermuda public's general knowledge of the Human Rights Act 1981 and the work of the Human Rights Commission.

The Human Rights Commission recognises the reliance placed on its good offices by the Bermuda community and that public trust is a vital precondition for the success of its current and future initiatives, as well as the fulfilment of its statutory mandate as enshrined in the Human Rights Act 1981. We will continue to foster our stakeholder connections, and monitor our policies and practices to ensure they remain effective, relevant and reliable.

The challenges facing a variety of rights issues in Bermuda, and the wider world have added a sense of urgency to the work of the Commission and a renewed focus on

upholding and fortifying the integrity of the Act and the principles therein. The intersectional nature of our work demands that we remain collaborative, focused and steadfast in our efforts. We leave you with thanks for the year past, and resolve for the year ahead in **BRINGING RIGHTS TO LIFE.**



## APPRECIATION AND ACKNOWLEDGEMENTS

The Commission relies on the contribution and participation of so many, and wishes to extend our appreciation to all those that support our significant mandate.

Above all, we wish to extend our thanks to those members of the public who have come forward with their queries, or complaints or ideas. We recognise it takes great courage to pick up the phone, or walk through the door to address concerns.

To the individuals, schools, teachers, business, religious leaders, government officials, service agencies who have reached out to address areas of concern in their practices, policies or spheres of influence in order to model best practice in support of rights, we thank you for your example.

As shared the work of the Human Rights Commission intersects with almost every service area in Bermuda, and all areas of life. We could not fulfill our mandate without the expertise, insight and open-mindedness of the many members of the public, private sector and public service who serve as advocates promoting the protections and aspirational commitment of the Human Rights Act in their daily work.

Our Human Rights Commissioners are private citizens, most with full time jobs. The post of Commissioner is largely volunteer and the role requires dedication, commitment and time. We wish to extend our thanks to the employers that recognise and support the valuable contribution their civil-minded employees are making in their duties as Commissioners.

# ANNEX 1

## HOW TO LODGE A COMPLAINT OR ADDRESS A QUERY

Anyone who believes they may have a complaint that contravenes the protections in the Human Rights Act have the right to contact the Office of the Human Rights Commission. The public may also contact the Office with any general queries, requests or concerns. You can choose to call, email or visit the Office to make contact.

-  **WALK-IN** Human Rights Commission  
Milner Place | Ground Floor | 32 Victoria Street | Hamilton HM 12
-  **MAIL** P.O. Box HM 734 | Hamilton HM CX
-  **PHONE** (441) 295-5859
-  **EMAIL** [humanrights@gov.bm](mailto:humanrights@gov.bm)
-  **WEB** [www.hrc.bm](http://www.hrc.bm)

A complaint must:

1. Be made orally, electronically or in writing.
2. Be made within six months after the alleged discrimination occurred (and up to two years if there is sufficient reason for the delay and that no one would be prejudiced due to the delay)
3. Be made by the Complainant, although the Act also allows for someone to make a complaint on behalf of another person, if that person consents and is unable to do so.

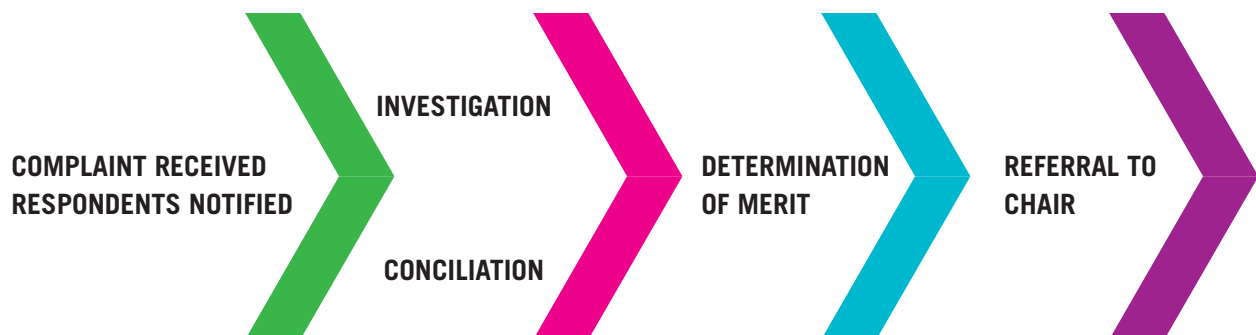
If assistance is required, the Officers can help with drafting the particulars of the complaint. Commission staff further contact the Complainant to clarify any issues raised in the complaint.

If the complaint does not fall under the jurisdiction of the Human Rights Act, the Complainant will be notified and the complaint may be closed however, where appropriate, referrals will be provided to other agencies which may be suited to assist in resolving the matter.

# ANNEX 2

## COMPLAINT HANDLING PROCESS

1. **Complaint Received** – The complaint is received by any of the methods outlined in Annex 1, and it is then logged on the Commission’s confidential database. An Officer is assigned to obtain as much relevant information as possible to clarify the complaint. The Respondent(s) are notified and, in the first instance, a preliminary inquiry may be conducted to determine if there is sufficient evidence to justify further examination. The Executive Officer considers the complaint and, if it is determined to be a prima facie case, the Respondent(s) are notified and requested to respond to the complaint.
2. **Investigation and Conciliation** – An investigation into the complaint may begin once the parties have provided their initial statements. Efforts will be made throughout the process to try to resolve the dispute.
3. **Determination of Merit** – Following an investigation, the Executive Officer considers the evidence adduced and makes a decision as to whether or not the complaint appears to have merit (appears to contravene or violate the Human Rights Act). If it is determined that the complaint does not appear to have merit, the Complainant is offered the opportunity to be heard and a final decision is made. If the complaint appears to have merit, mediation may be offered to the parties by the Executive Officer as a means of resolving the matter before referral to a Tribunal.
4. **Referral to Chair** – If the matter is unresolved, or is unlikely to be settled, the matter is referred to the Chair of the Human Rights Commission who shall empanel a Human Rights Tribunal.





## ANNEX 3

### HUMAN RIGHTS TRIBUNAL PROCESS

A Human Rights Tribunal is an independent body empanelled by the Chair to resolve cases of alleged discrimination in a fair, just and timely way. Tribunal members have no previous knowledge, involvement or information relating to the investigation process. The Chair of the Commission receives only the Complainant's and Respondent's statements to inform them of the basis of the matter.

Parties are first offered the opportunity to settle the dispute through mediation. If the parties do not agree to mediation, or mediation does not resolve the dispute, the Chair empanels a Tribunal. The Tribunal consists of three (3) Commissioners; a legally qualified Chair and two (2) members. The onus is on the parties to a complaint to supply the Tribunal with all evidentiary materials to support their claim, including witness statements.

The Tribunal is empowered to determine whether unlawful discrimination has occurred. Upon a finding of discrimination, the Tribunal may award damages, issue recommendations and make such orders that are enforceable and registered by the Supreme Court. Appeals of Commission decisions may be brought before the Supreme Court.



# ANNEX 4

## AREAS OF PROTECTION UNDER THE HUMAN RIGHTS ACT 1981

**In addition to the Grounds of Protection, the following areas apply:**

**Section 3:** Notices – this Section provides protection as no one is allowed to display, publish or post any discriminatory sign, symbol or notice against any person or persons based on the protected grounds.

**Section 4:** Disposal of Premises – this Section provides protection for persons seeking to rent accommodation, acquire land or other premises – whether as a renter or as an owner. Persons cannot discriminate because of your race, place of origin etc.

**Section 5:** Goods, Services and Facilities – where a person is seeking to obtain goods, facilities or services, whether on payment or not, persons are protected from discrimination by others that would be a violation of any of the grounds set out in Section 2(2).

**Section 6:** Employment, Special Programmes & Harassment – this Section provides protection against discrimination in Employment. Employers are barred from discriminating in hiring, training, promoting, dismissing or demoting any person because of his race, etc. Employers and employment agencies are barred from discriminatory advertising.

**Section 6B:** Harassment – employees are protected against harassment from their employers. Harassment is persistent, vexatious and the employer, agents of employers or other employees should know or ought to know that it is not welcome by the employee.

**Section 7:** Organisations – protection against discrimination in clubs and other organisations, whether a member or not.

**Section 8:** Proceedings under the Act – persons are barred from treating someone who made a complaint under the Act, differently. For example, where an employer fires an employee, or punishes him/her, or intimidates such employee, because she/he made a complaint under the Act.

**Section 8A:** Racial Material & Harassment – persons are not allowed to publish racial material to incite or promote ill will against any part of the community because of their race or colour. No person should incite a breach of the peace against any part of the community, because of race, etc.

**Section 9:** Sexual Harassment – this Section provides protection from sexual harassment from employers, agents of employers, other employees, and landlords. The employer must protect against sexual harassment in the workplace.

**Section 10:** Discriminatory Covenants – where there is a legal instrument passing property, such as a Deed, if it is drafted in a discriminatory way so as to contravene the grounds as stated in Section 2(2) of the Act, the instrument would be deemed null and void. It would have no legal effect.

## ANNEX 5

### CITIZEN'S UPROOTING RACISM IN BERMUDA (CURB): Truth and Reconciliation for Bermuda



**PRESS STATEMENT – 11 January 2017 CURB LAUNCHES TRUTH & RECONCILIATION PROCESS**

**What kind of Bermuda do we think our children want to inherit?**

**What are we willing to do to create that future?**

There's no doubt that Bermuda needs to have ongoing dialogues. The unrest in March and December 2016, and the subsequent unrest earlier this month demonstrates that we are a divided people. Though most Bermudians don't see each other as enemies; the disconnect is palpable. We speak of working together and unity. However, the racial divide is widening, economic disparity between the races continues to grow; and social media is both educating, and in some people's minds, inflaming passions.

As individuals, and as a community, we need to understand that the trauma of the past continues to play out in our community; we need to acknowledge, learn and embrace our history; we need to honour and teach the stories of those who fought for freedom; we need to raise awareness that a legacy of prejudice and inequity continues; we need to become conscious of the disconnect, misunderstandings and distrust that persist; and we need to repair the damage and provide people with a way towards healing and reconciliation.

In the 1990s the National Association for Reconciliation worked to bring the races together. Between 2000 and 2010, the Commission for Unity & Racial Equality worked to create diversity in our businesses, organisations and the greater community. The Big Conversation in 2007/2008 was groundbreaking. It brought extraordinary speakers from overseas, but received negative media backlash and was not sustained. Since late 2005, members of Citizens Uprooting Racism in Bermuda have worked to sustain the conversation around the need for greater equity and racial justice, and there is no doubt there is an increasing awareness of the need to face these issues and the legacies of the past.

But where do we go from here? There are some who seek reconciliation through discussion, acknowledgement, education and the implementation of systemic changes, including reparations; there are others who think we need to leave the past behind and move on, believing that simply "talking" about race sustains the discord. And there have been calls, both past and present, for a "national conversation about race." CURB believes it is time to begin a truth and reconciliation process to



change the way we talk about race, justice and poverty and confront our history of racial inequality and injustice. We cannot move forward as a country until we heal from the trauma of the past. It is important to continue educational workshops, seminars, lectures and presentations around racial justice issues, but there needs to be another way to build community. To be clear, larger 'national' events will be planned, but the best conversations occur with 15 – 20 people in a room, creating relationships, community and authentic conversations around social justice, the need for healing and equity. Not just platitudes, but real talk. **Confronting something does not mean it has to be confrontational.** Using this platform, participants can speak uninterrupted about their experiences. Telling one's stories is cathartic for those who have been traumatised, and listening to other people's stories leads to greater empathy and understanding. It allows our humanity to come through and the empathy created, displaces cynicism and distrust. It can lead to tears, but at other times to laughter. Most importantly, connectivity grows. Unity cannot exist without building community.

For this process to be successful, openness, authenticity and trust is critical. Indeed, there can be no systemic change without including relationship and trust building. When we put ourselves in others' shoes, it's harder to think of them as "other." Henry Wadsworth Longfellow said, "My enemy is someone whose stories I don't know." Small group conversations cannot stand alone. They must be taken from person-to-person; carried group-to-group; and become a national conversation, and ultimately the discourse will create a foundation for policy changes. This translates into a groundswell of community groups, faith communities, organisations, working towards greater equality, racial justice and solutions to resolve racial inequity.

Beginning in February CURB will begin a truth and reconciliation process by creating dialogue groups called "Community Conversations". These will be held in the East, West and Central part of the island. The groups will be facilitated by trained mediators, facilitators and skilled individuals, and will consist of up to 20 participants who will stay together for a series of conversations over a period of three months. CURB will provide guideline topics for each meeting, and will provide resources that can be shared with groups, in advance, for review prior to the gathering.

It is hoped these groups will build community and find ways to create change within their own sphere of influence, and then share with the greater community. Most importantly, we will look for the groups to build upon and develop additional ideas to bring about social change and greater racial justice and equity in our society. At the end of the 3-months, the groups will meet as one to consolidate their ideas. Additional groups will be formed later in the year and the process will begin again. If members of the public, organisations or faith communities are interested in being a change agent and becoming part of Bermuda's truth and reconciliation process, please reach out to us via email [admin@uprootingracism.org](mailto:admin@uprootingracism.org) or call 505 0112. We urge the community to support Bermuda's Truth & Reconciliation process and create the change you want, by becoming actively involved in creating a racially equitable and socially just Bermuda that our children will be proud to inherit. Thank you.

# ANNEX 6

## PARIS PRINCIPLES PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS

### Competence and responsibilities\*

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
  - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicise them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
    - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organisations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
    - (ii) Any situation of violation of human rights which it decides to take up;
    - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
    - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
  - (b) To promote and ensure the harmonisation of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
  - (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- (e) To cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicise human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

### **Composition and guarantees of independence and pluralism**

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
  - (a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;
  - (b) Trends in philosophical or religious thought;
  - (c) Universities and qualified experts;
  - (d) Parliament;
  - (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).
2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.



3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

## **Methods of operation**

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicise its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organisations in expanding the work of the national institutions, develop relations with the non-governmental organisations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas.

## **Additional principles concerning the status of commissions with quasi-jurisdictional competence**

A national institution may be authorised to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative

organisations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

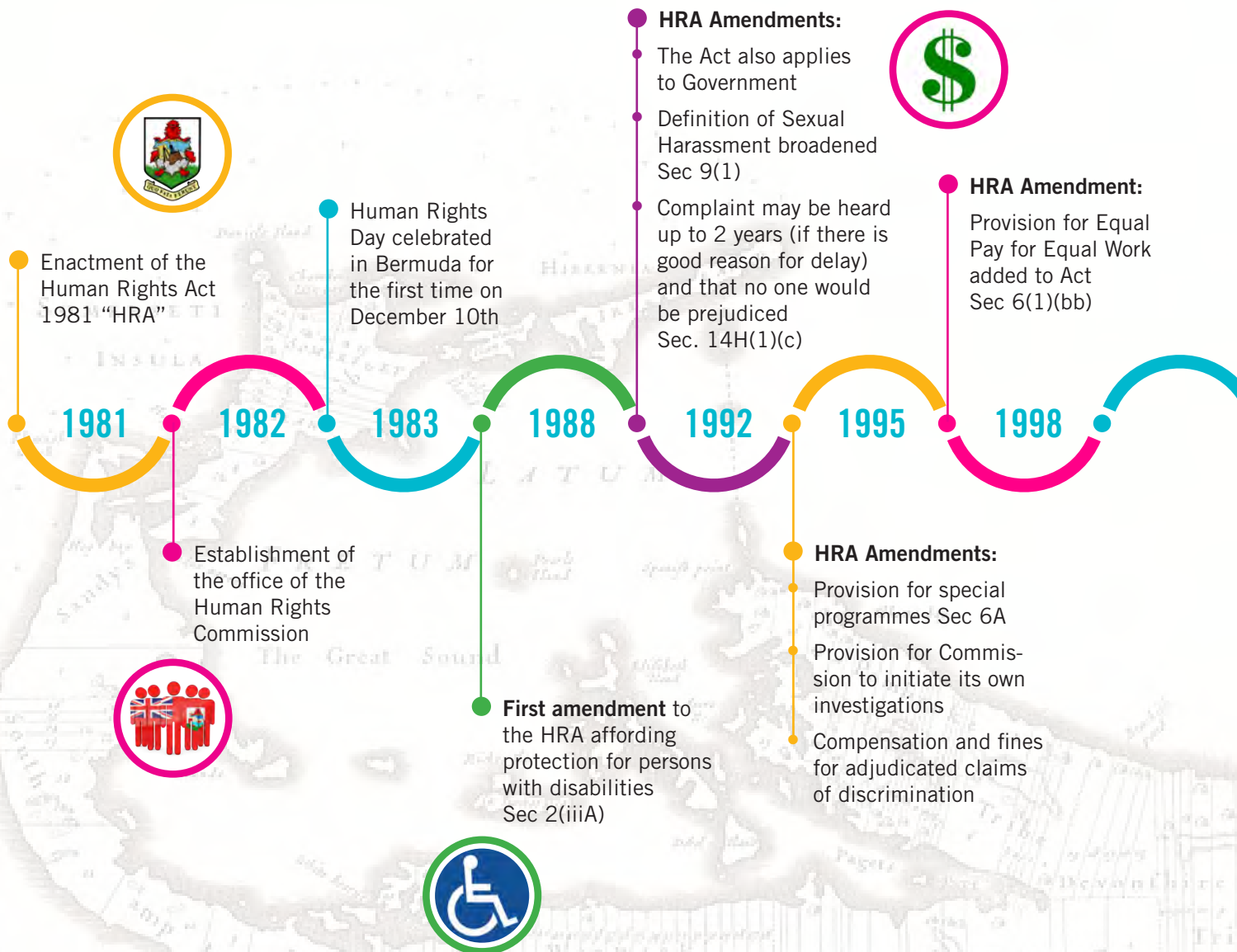
- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

\* *Paris Principles* defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

## ANNEX 7

# TIMELINE OF THE HUMAN RIGHTS ACT

EST. 1981



Human  
Rights  
Commission  
Bermuda



### HRA Amendments:

- Definition of physical disability expanded Sec 2(1)(a)
- Terms such as “ancestry” replaced with “ethnic or national origins” and “religious beliefs” replaced with “religion or belief” Sec 2(2)(vi)
- Provision for protection in the area of employment for persons who have criminal records Sec 2(2)(a)(vii)
- The term “secrecy” was replaced with “confidentiality”
- Expanded protection for employees with employers expected to ensure a workplace free from harassment and discrimination

### HRA Amendment:

Expanded protection for persons with disabilities in the area of employment with the provision for employers’ duty to accommodate up to the point of unreasonable hardship (Schedule 1)



### Amendment to the structure and function of the Commission:

- Replacement of the Boards of Inquiry process with Human Rights Tribunals and independent appointment of Commissioners

### HRA Amendments:

- Expanded protection for persons who have or have had a mental impairment Sec 2(1)(b)
- Further protection to prohibit the publication of racist material and racial incitement to include all protected grounds of discrimination Sec 8A(1)(a)
- Expansion of the definition of a public place to include any other premises or place to which the public has access, whether on payment or otherwise Sec 8A(3)(aa)

2000

2005

2010

2011

2012

2013

2016

### Amalgamation:

The functions of the Commission for Unity & Racial Equality (CURE) were transferred to the Human Rights Commission and the CURE Act repealed



Voluntary mediation introduced as the primary means of settling complaints

### HRA Amendments:

- Protection from discrimination afforded to persons on the basis of sexual orientation Sec 2(2)(a)(ii)
- Protection afforded to persons on the basis of age in the areas of goods, facilities and services and accommodations (except in the area of employment) Sec 4(1) & Sec 5(1)
- Terms ‘not born in lawful wedlock’ and ‘has or is likely to have a child whether born in wedlock or not’ replaced with the term ‘family status’ to cover a range of family forms Sec 2(2)(a)(iv)
- Expansion of communication formats e.g. use of social media, as a form of publication – Sec 8A
- Expanded description of available dispute resolution methods added Sec (14J)
- Human Rights Tribunals adjudicate complaints of discrimination, with judgements enforceable through the Supreme Court





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