21 June 2018

Open letter to the Secretary General of the Commonwealth of Nations, the Right Honourable Patricia Scotland QC, from the International Bar Association’s Human Rights Institute

Dear Secretary General,

We are writing to you on behalf of the International Bar Association’s Human Rights Institute (IBAHRI) in light of the recent positive development made by the Bermuda Supreme Court with respect to the human rights of the LGBTI citizens of Bermuda. The IBAHRI expresses its disappointment at the silence of the Commonwealth of Nations regarding the efforts by the legislature of Bermuda to reverse the same-sex marriage decision of the Supreme Court, and on the silence of the Commonwealth of Nations on the issue of LGBTI rights in Commonwealth countries.

The International Bar Association, established in 1947, is the world’s leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

The IBAHRI understands that, in May 2017, the Supreme Court of Bermuda decided in a properly constituted and fully argued decision that citizens of Bermuda were entitled to marry persons of the same sex. Following this, the legislature introduced amending legislation purporting to reverse the Supreme Court’s decision, by exempting same-sex marriage from the operation of the Human Rights Act, and enacting a different, lesser entitlement (‘civil union’) to take effect from 1 June 2018. The IBAHRI has received reports that the Supreme Court of Bermuda, on Wednesday 6 June, found this reversal to be inconsistent with the Bermudan constitution and therefore invalid.
The IBAHRI further understands that, pursuant to the law of Bermuda, the Bill to enact the discriminatory consequences discussed above was presented to His Excellency the Governor of Bermuda for the signification of the Royal Assent. The Bill was reserved for the provision of legal advice by the United Kingdom Government on whether the Royal Assent should be withheld on the basis of the deprivation, thereby effected, of the human rights of LGBTI citizens of Bermuda. The matter was debated in the United Kingdom Parliament on 29 January 2018, and the result was that the Governor of Bermuda signified the Royal Assent by signing the Bill into law.

The IBAHRI welcomes the steps taken by the Supreme Court to protect basic rights of the LGBTI minority in Bermuda and encourages further action towards the protection against the diminution of such rights. This decision aligns with the international principles of non-discrimination and equality before the law enshrined in the International Covenant on Civil and Political Rights (ICCPR), and the values of equality and respect protected in the Charter of the Commonwealth.

However, the IBAHRI also takes this opportunity to note some continuing issues of concern. The IBAHRI deeply regrets the silence of the Commonwealth Secretariat during the recent efforts of the legislature of Bermuda to reverse the human rights-based decision of the Supreme Court of Bermuda.

The IBAHRI also expresses its disappointment over the persistent failure of the Commonwealth of Nations at the CHOGM in London April 2018 to take steps to urge the repeal, in many member countries, of similar criminal laws that result in many cases of death, violence, discrimination and injustice. The final communique of CHOGM 2018 did not mention this issue, despite many representations made to the Organisation and despite the terms of the Charter of the Commonwealth that reaffirm the principles of equality and non-discrimination governing all Commonwealth citizens. You yourself were also silent on this important matter of human rights concerning Commonwealth citizens.

As the report of the Eminent Persons Group urged at CHOGM in 2009, in a unanimous report, the repeal of such laws is an urgent necessity, not only on the basis of human rights and the Commonwealth’s own Charter, but also on the basis of ensuring an effective response to HIV/AIDS in Commonwealth countries where rates of infection are significantly higher than in countries without such laws. The silence of the Commonwealth on these issues is contrary to human rights and the resolution of the IBA Council Repeal of criminal laws that impose penalties relating to certain sexual conduct (adopted 24 May 2014). Your own silence on this topic is also profoundly disappointing.

In light of the above, the IBAHRI calls on you, as Secretary General of the Commonwealth of Nations, to take steps to ensure that the LGBTI community is afforded the rights protected in the Charter of the Commonwealth and in international law. The IBAHRI further urges the
Commonwealth of Nations to take all possible measures to encourage the repeal, in those countries that retain them, of criminal laws that discriminate against the LGBTI community and result in many cases of death, violence, discrimination and injustice.

Yours sincerely,

Ambassador (ret) Hans Corell
IBAHRI Co-Chair

The Hon Michael Kirby AC CMG
IBAHRI Co-Chair

Cc

The Honourable David Burt, JP MP
Premier of Bermuda
The Cabinet Office
105 Front Street, Hamilton
Pembroke Parish
Bermuda

The Right Honourable Boris Johnson MP
Foreign Secretary of the United Kingdom of Great Britain and Northern Ireland
Foreign & Commonwealth Office
King Charles Street
London SW1A 2AH

His Excellency Mr John Rankin CMG
Governor of Bermuda
Governor's Office Hamilton
11 Langton Hill
Pembroke
H.M 13
Bermuda