



# Comments on Government's Draft Immigration Policies

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## 1. Extension of Spouse's Employment Rights to the "Divorced Parent of a Bermudian"

We applaud Government's proposal to recognise and confer rights on the divorced parent of a Bermudian. Too often, in our experience, the divorced parent is left in a very vulnerable situation, which is exasperated by the uncertainties associated with obtaining a work permit. As well, it has been this firm's experience that some Bermudians have used the immigration policy as a weapon against their non-Bermudian spouse, solely as a means to torment the spouse, without taking into account the harmful effects such behaviour has on the children of the marriage.

We think that the policy, however, is flawed in two important respects. Our first concern is that Government has tied the obtaining of the certificate to a requirement that the applicant must have custody of the minor Bermudian child. This is a mistake. Bermuda, unlike many other jurisdictions, has not been plagued with a proliferation of bitter custody disputes. Usually, the parties are able to work out their differences so far as custody, care and control and access of the children are concerned. The immigration policy will, however, turn custody into a major battle ground as the non-Bermudian parent, quite understandably, will want to maintain his or her relationship with the child and the policy forces the individual to battle it out on the issue of custody. We think that the better approach would be to amend the qualification by requiring the applicant to have either custody or an access order in their favour. Matrimonial law now recognises that in terms of the welfare of the child, access is as important as custody and the current case law suggests that the notion of sole custody is both antiquated and detrimental as it curtails one parent's involvement in the life of the children which is detrimental to the general welfare of the child.

Our second concern is that the policy is not in step with the Constitution (Section 10) and international human rights conventions in that it terminates family rights once the Bermudian child turns twenty-two. As a matter of law, a Bermudian child, whether he/she be 2 or 34, cannot be deprived of his mother or father, solely because of their citizenship. From a practical perspective, assuming a policy based on age is constitutional, many Bermudians in their early 20s are still very much reliant on the support (both emotional and financial) of both parents. Take for example, the 23 year old who is in university who requires the financial assistance of both parents. Requiring the non-Bermudian parent to leave Bermuda and his or her employment is harsh and disruptive to the Bermudian child. Moreover, in a just and reasonable society, family life should be jealously guarded. The effect of this policy would result in the severing of the fundamental fabric of our society, which is the nuclear family. Requiring a parent to leave Bermuda or making continued residence on these Islands impossible by restricting that parent's ability to work when the child reaches the age of 22 years would cause irreparable damage to the fabric of this community. Let us not forget that statistically one in two marriages end in divorce. The effect on the

Bermudian child is that he or she would be left at age 22 without the contact and support of the custodial parent. When considering the above, we have no doubt that this policy offends the Constitution as interpreted in the Fisher decision.

## **2. Working Resident's Certificate**

The only criticism we have is that the holder of the WRC is restricted from obtaining employment in the closed or restricted categories. In our opinion, such a policy discriminates against those non-Bermudians who have not had the benefit of higher education. Many long-term residents may not have the expertise to occupy a position outside of the restricted categories.

## **3. Fine Artist**

This policy makes little sense in an age where any Bermudian or resident of Bermuda can click on the internet and order art produced by unknown artists or masters, depending on what your taste might be and your financial means. The proposed policy will only give encouragement to local galleries to shut their doors. Already, a number of galleries have closed or are about to close as the business is no longer viable. Add restrictions on what can be sold and the few remaining will close their doors. With the disappearance of such galleries, there will be even fewer opportunities for Bermudians to display their art. On another note, the policy fails to recognise the fact that we have a mobile, affluent population. Bermudians and residents are not going to purchase art merely because it has been created by a Bermudian and Government would be fooling itself to believe that there are sufficient tourists to make this policy work. The reality is that whenever Government attempts to impose censorship laws/policies, this generally drives up the demand for what cannot easily be obtained.

From a legal perspective, the policy falls into the category of a censorship law and we have no doubt that if challenged, it will be found to be unconstitutional under Section 9 (Right of Expression) of the Constitution. Government would be introducing a very dangerous policy and we do not think that Government's intent is to create laws or policies which contravene the Constitution. The policy will only create unnecessary fear and concern in the community. People will wonder whether Government will attempt to regulate what books we purchase and read. The policy as written is ill conceived.

## **4. Salesperson's Permit**

E-commerce makes this particular policy of limited value.

## **5. Volunteers**

We applaud the Minister for removing any existing barriers in respect of non-Bermudians volunteering their time to worthy causes in Bermuda.

## **6. Seeking Employment**

This policy does not work. We venture to say that the majority of businesses in Bermuda receive countless requests from non-Bermudians seeking employment opportunities. The immigration laws and policies should be confined to ensuring that the company has made all reasonable attempts to secure a Bermudian for the position. We think that the better approach is to accept what takes place in practice, but make it a requirement that on the application form, the employer must list how the initial contact was made with the non-Bermudian. The purpose of the disclosure would not be to penalise but to ensure that the company has made reasonable efforts to find a

Bermudian for the position.

## **7. Marriages of Convenience**

We would caution Government to be mindful of Section 10 (Right of Association) and Section 11 (Immunity from Expulsion) of the Constitution when devising a questionnaire to determine whether the marriage is one of convenience. The Government should approach the matter with care and, in this regard, we would suggest that they adopt a procedure which has been accepted in jurisdictions where there is a strong appreciation for the constitutional rights of its citizens. Government may have a legitimate right to inquire into the sanctity of marriage; it does not have a right to intrude.

## **8. Residential Certificates**

Is it Government's intention to prohibit someone such as Bill Gates, who is under 50 years of age, from obtaining a residential certificate? There can be no reasonable justification for prescribing arbitrary age requirements. In the new economy, retirement, particularly among the affluent, can be achieved well before 50. We think an age requirement for residency is irrelevant and should be abandoned. We also believe that Government should not introduce a rigid requirement prohibiting these individuals from having dependent children. We must adopt a realistic approach. The reality is that there are going to be few individuals who have dependent children who wish to retire to Bermuda. Those that do will be the exception and given their affluence it is quite likely that in many instances their children will be in boarding schools. The burden on Bermuda's infrastructure is likely to be insignificant. We would urge Government to adopt a flexible policy which examines each application on its merits, regardless of whether the applicant has children or is of a particular age.

## **9. Voluntary Waiver of Residence Rights**

We think that this policy makes the most sense for ensuring that non-Bermudians do not acquire long-term residency rights. We would strongly urge Government not to set a specific limit on the number of years that a non-Bermudian can reside in Bermuda, unless that non-Bermudian has decided not to sign the waiver, in which case, some reasonable limit may make sense. If, however, a waiver has been signed, then Government should not be concerned about the length of time that the non-Bermudian works in this jurisdiction, provided that the company has made reasonable efforts to secure Bermudians for the position.

In terms of professionals, non-Bermudians who come to Bermuda, often time lose the ability to practise in the jurisdiction they have come from. In terms of their career, they sacrifice a great deal in order to provide their skills and expertise to a company or firm in Bermuda. It is counterproductive to any business in Bermuda to have a revolving door of non-Bermudians and it is far better in terms of providing a quality service that there be continuity. Companies invest a great deal of time and money in developing their staff, both Bermudians and non-Bermudian alike. Many areas of the law are highly specialised and it takes years for a small firm to develop that expertise. It would be most unfortunate and destabilising for these firms, for the non-Bermudian who has assisted in developing the firm's expertise to be asked to leave at the end of a specified period, even though there are no Bermudians to fill the position, solely because the non-Bermudian has reached some arbitrary time limit. Government must take into account that if, for example, a firm has two non-Bermudians, generating \$600,000 in revenue for the company, and this revenue supports and benefits many of the

Bermudians in the operation. If the policy creates a situation where that revenue stream is depleted, the business does not grow, it may stagnate and the result will be that opportunities for Bermudians will be lost.

The proposed time limit will also result in a situation where Bermuda is attracting non-Bermudians who are more interested in an adventure or vacation, rather than an employment opportunity. If Bermuda is going to attract qualified and experienced professionals, then some degree of security must be given to them in order to offset what they give up by coming to Bermuda. If Government imposes a time limit, we suspect that many non-Bermudians will leave Bermuda prematurely and new businesses will prefer to establish themselves in a less regulated jurisdiction. This is bound to cause harm to all Bermudians.

Arbitrary time limits are a colossal mistake. Businesses whether they are local or exempt, cannot be run on six-year intervals marked by an exodus of employees. Furthermore, Government's policy is a throw back to an isolationist era when the rest of the world is embracing a global economic perspective. Modern, progressive businesses will simply not put up with employee time periods imposed by the Bermuda Government. The tax advantages for coming offshore are evaporating and indeed most of the OECD countries are applying considerable pressure to ensure that tax advantages are eliminated or significantly decreased. What then does Bermuda have to offer? If we take away the ease of doing business in Bermuda, if we impose a restrictive and paranoid regulatory environment, what is the point of doing business here? The answer is simple. The international companies will stay away and entrepreneurial Bermudians, who would otherwise have invested their energies in Bermuda, will invest their time and money on companies that have no connection at all to Bermuda. Where are you going to invest your money? In a country where the laws and regulations restrict and hamper the growth of companies or in countries that welcome and encourage businesses to establish themselves in their jurisdiction?

A major consideration of international business is the ease and cost with which it can operate. The proposed policy will increase costs and create additional hurdles at a time when it is easier to transfer from one jurisdiction to another based on competitive advantages. International business will locate wherever the most favourable business environment exists.

Government's proposed policy also fails to recognise the fundamental shift in how business is done. People are less interested in wages and far more interested in financial benefits that are tied to the growth of the company. Bermuda will not attract the necessary expertise to make international and local business viable if the non-Bermudian has no chance or opportunity to share in the long-term success of the company.

If Government believes time limits have any merit, then the public needs to know what is the justification for such limits and whether the benefit of such limits outweigh what Bermuda will lose. Government has not clearly articulated its position. Our experience has been that there has always been a shortage of Bermudians for the majority of positions advertised. Those cases where Bermudians are wrongfully deprived of job opportunities are isolated and by and large, local companies and exempt companies have provided significant opportunities to Bermudians who want to work and who want to succeed. The proposed time limit policy seems to pander to the few instead of recognising that the majority of Bermudians benefit from policies which make non-Bermudians feel welcomed in our country and which allow Bermuda to

prosper from their skills and expertise.

The government must be concerned with the fallout caused by the "perception" of the business and the international community that Bermuda is not flexible and willing to assist in promoting commerce. Whether this perception is the truth or not, it will cause damage to Bermuda as other jurisdictions will and have taken advantage of this perception to Bermuda's detriment. Blanket time limit prohibitions create an air of astringency and inflexibility that business will feel is not conducive or indicative of a jurisdiction that desires their business.

In the circumstances, we would encourage Government to move away from imposing arbitrary time limits on work permits and, instead, put into place the voluntary waiver proposal.

#### **10. Limiting the Length of Employment in Occupations within the Limited Category**

We repeat what we said in paragraph 9 above. We are particularly concerned that the policy is out of touch with the reality of what businesses face in Bermuda. In the context of emerging law firms, it is difficult to find Bermudian company and real estate lawyers. Businesses are not built overnight, particularly emerging businesses. If Government wants to ensure that the economic power base on this Island remains with the established firms and businesses, then the policy will accomplish that goal. If Government wants to ensure a competitive environment, then the policy will need to be adjusted. Setting time limits will ensure that the established firms maintain their positions over emerging firms as they have had the benefit over a considerable period of time to take advantage of the expertise of non-Bermudians in building their various departments. Over the course of years, that expertise has been used to train Bermudians and, consequently, the larger firms are now at a great advantage over emerging firms. In short, Government's policy favours the large established firms at the expense of those firms who are trying to build their business.

With respect to the definition of "key to the business"; we are not sure why Government is tying the individual's expertise to whether or not there is a worldwide shortage of the person's particular skills. A better approach seems to be whether there is a shortage for that particular skill in Bermuda. If there is a shortage of actuaries in Bermuda, but not elsewhere, it makes sense that we do what is necessary to attract actuaries to Bermuda.

With respect to executive secretaries and personal assistants, we can see no valid reason for asking a non-Bermudian to leave, merely because an arbitrary time limit has been reached. If Bermudians are not available, and the non-Bermudian has signed a voluntary waiver, there can be no rational reason for requiring this individual to leave, only to have the position filled by a non-Bermudian who will have to accustom themselves to Bermuda and their employer's business. This disruption cannot be warranted.

#### **11. Yearly Advertising Requirements and Escalating Permit Fees**

Bermuda is going to shoot itself in the heart. The proposed policy makes it that much more difficult and expensive to do business. On a human level, a yearly advertising policy generates unnecessary anxiety and discontent in the work place. We must ask who is out of work? Do we have such an unemployment problem in Bermuda that frequent advertisements are required? We think the policy focuses on a false perception that opportunities need to be secured for Bermudians when in actual fact there are not enough

Bermudians to take advantage of the many opportunities that exist, throughout every level of the market place.

Yearly advertising adds unnecessary bureaucracy and expense to businesses. It also gives rise to the perception that Bermuda is only interested in securing the services of migratory workers. If our economy depended upon picking potatoes, then the policy of advertising yearly makes sense, but Bermuda's economy is dependent on international business where a migratory work force creates unacceptable inefficiencies. Bermuda must create an environment where businesses thrive. A yearly advertising requirement and escalating permit fees are out of step with what Bermuda needs to succeed in a global economy. Businesses simply cannot prosper if the immigration policy creates a situation where from year to year you never know who is going to be working for the company, and quite frankly, who would want to work for such an unstable company. Unfortunately, the proposed policy makes every business in Bermuda such a company.

We have obviously concentrated on those areas which cause us concern. We would, however, like to end our submissions by saying that there are many aspects of the policy which are reasonable and meet the needs of Bermuda. We believe, however, that the policy can be significantly improved upon and it is in this spirit that we have approached our review of the said policy. It is commendable that Government has created a forum for discussion on this important topic, and it is hoped that in this same spirit Government will be receptive to the concerns of local and international business.

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