



Cayman Islands Human Rights Commission

promoting, protecting and preserving human rights

For Immediate Release

4 April 2019

Statement on Decision of CI Government to Appeal the Chief Justice’s Ruling Legalising Same-Sex Marriage and Debate in Legislative Assembly on 3 April 2019

Yesterday morning (3 April 2019) the Hon Premier indicated that the Government would be appealing the Hon Chief Justice’s recent decision legalising same-sex marriage. Extraordinarily, the Hon Premier admitted that the decision to appeal had been taken the previous day “based on the Executive Summary of the Court’s judgment” and not having analysed the full judgment.

The Executive Summary of the judgment made it abundantly clear that the Constitution left the Court with no choice but to make the decision that it did. The judgment was based on settled legal principles established at the highest level, in the Privy Council and throughout the common law world. The Commission has previously noted the importance of reading judgments fully before commenting on them (see press statement of 23 June 2016 on this very issue). The importance of reading a full judgment before committing hundreds of thousands of dollars of public money to appellate litigation is particularly significant.

The Chief Justice’s Judgment

The Commission has now received and reviewed the full judgment in *Day & Bodden Bush v The Governor et al.* It is clear that any appeal by the Respondents (“the Government”) is weak to the point of being unarguable. This is not just because the Chief Justice ruled against the Government on every single point, but also because *the Government itself* either failed to provide a response to so many points made by the Petitioners, or simply conceded them as indefensible. It is inferred that the Government’s experienced legal team, including the Attorney General’s Chambers, did not make these concessions and omissions without instructions from the Government.

The Government conceded during the litigation that the legal position in the Cayman Islands was discriminatory. The Chief Justice found that the Government’s attempted justification for that discrimination “collapses and fails at the first hurdle” as clearly not being within the law. It is a cause for regret that a decision has now been made to seek to relitigate this case in an attempt to maintain that discrimination. Unjustified state-sponsored discrimination has no place in a modern democracy and it is unlawful under Cayman’s Constitution.

Noting decisions of the South African Constitutional Court and the US Supreme Court the Hon Chief Justice drew comparisons with attempted justifications for slavery, and the apartheid-era prohibition of interracial marriages, now rightly regarded with shame and embarrassment. Referring to the arguments put forward by the Government in this case he noted:

“the Respondents can no more justify exclusion from the institution of marriage on the ground that a couple are of the same sex, than exclusion could be justified on the ground that a couple are of different races.”

The Legislative Assembly Proceedings on 3 April 2019

Regrettably, many of the statements made in the Legislative Assembly yesterday demonstrated that the speakers had also not taken the time properly to analyse even the Executive Summary of the judgment.

This press release is not the place to attempt to recast the powerful, eloquent and comprehensive judgment by the Chief Justice which systematically debunked those arguments that the Government had not already conceded: if called upon the Court of Appeal is well placed to clarify the position. The public is strongly encouraged to read the judgment which makes it clear what the law is and what the Court’s role is in protecting the rights enshrined in our Constitution.

Nevertheless, in light of some of the repeated and obvious misunderstandings articulated in the Legislative Assembly yesterday the Commission would make the following observations:

Many of the speakers appeared to believe that an appeal was necessary to protect the concept of the separation of powers in the Islands. The Chief Justice’s reliance on s.5 of the Constitution was criticised for overriding the will of the Legislative Assembly. It is perhaps unfortunate that, aside from not reading the judgment, those speaking were apparently unaware of the case law from the Privy Council dealing with this exact point; this settled law is set out clearly in the judgment. Stated briefly, in circumstances where the Legislative Assembly has previously passed a law that is contrary to the Constitution the Constitution itself *requires* the Court to modify that law to make sure that its provisions are not breached. This is not an area for judicial discretion – the Court has no choice.

Similarly, much discussion in the Legislative Assembly was given over to the claimed desire of the majority of the public to perpetuate discrimination against same-sex couples, although no evidence was adduced to support this. Such an approach fails to take into account the fundamental principle - that the Constitution will respect, and will protect, the rights of the minority even if the majority will not. John Stuart Mill referred to “the tyranny of the majority” over 150 years ago. Last week the Chief Justice was utterly clear: “The views of a majority cannot be an objective basis for denying the rights of a minority”.

Repeatedly yesterday it was suggested in the Legislative Assembly that the Chief Justice should have relied on s.23 of the Constitution to make a declaration of incompatibility between the Marriage Law and the Constitution, and thereby leave the decision of how to rectify that incompatibility to the Legislature. Again, this demonstrates a failure to understand how the Constitution operates and what it requires. S.23 only applies to laws passed *since* the Constitution came into force. The Government conceded at trial that the Marriage Law was an *existing* law and therefore fell to be dealt with by the Court (not the Legislature) under s.5 of the Constitution. Again, it is to be inferred that the Government's own lawyers did not make this concession without their clients' instructions.

Rational Decisions Regarding the Use of Public Funds

Having lost (or conceded) every legal point in the trial the Government was ordered to pay the Petitioners' costs. The Government is also responsible for paying for its own senior QC to fly out to Cayman, stay here, and defend the discriminatory position it wished to perpetuate. The first trial has cost the public hundreds of thousands of dollars. This ill-considered appeal will waste many hundreds of thousands of dollars more.

The Commission receives regular complaints from Caymanians who cannot afford basic necessities like shelter, medical care or even clothing – our underfunded NAU could make a real difference for the most vulnerable with these funds. Last month the Meals on Wheels charity, which provides food for seniors, the homebound and the disabled throughout Cayman, noted that there was a waiting list for its services of over 80 people in West Bay alone. Surely these funds could be better spent feeding those who cannot do so themselves. Social services, medical care, education, policing, infrastructure, the environment, domestic violence prevention...the examples of how these public funds could be better spent than attempting to continue to inflict unjustified discrimination are almost innumerable.

This appeal seeks to perpetuate discrimination and if successful would to remove protections from all minorities, not just same-sex couples. Shamefully, it would put Ms Day and Ms Bodden Bush through the stress and expense of defending further legal action simply to be treated with the same dignity and equality that other Cayman residents enjoy. Inexplicably, it was brought without even reviewing the full judgment. Unforgivably, it will also deprive vulnerable members of our community of access to the much needed funds which will be wasted litigating it.

Before it pursues this ill-advised appeal the Commission recommends (pursuant to s.116(7) of the Constitution) that the Government review the full judgment and properly consider its legal position. Further, it recommends the Government take legal advice on its duty to the public under s.19 of the Constitution, which requires that it make decisions which are rational.

Ends.