



Statement on Same Sex Marriage ruling

By Premier Hon. Alden McLaughlin, MBE, JP, MLA

Wednesday, 3 April, 2019

Mr. Speaker,

Yesterday April 2, 2019, the Cabinet of the Cayman Islands instructed the Hon. Attorney General to pursue an appeal against the judgment of the Hon. Chief Justice, Anthony Smellie, Q.C., handed down on 29th March in Civil Cause No. 111 of 2018 and Civil Cause 118 of 2018, otherwise known as the Same-Sex Partnership case. The Hon. Attorney General was also instructed to seek a stay of execution of the judgment pending the outcome of the appeal.

Mr. Speaker, as you have indicated you, like me and indeed all of us in this House, received many telephone calls, Whatsapp and text messages in the days following the handing down of the Chief Justice's judgment. Mr. Speaker there were those who sent messages stating that they feel the outcome was right. There were many more that sent messages stating that they feel wronged by the decision and made clear in no uncertain terms their view that marriage should remain the exclusive

domain of heterosexual couples. And there were also those who, regardless of how they feel about the concept of same-sex marriage, expressed shock and disbelief that the Court could have made such a fundamental public policy change in a matter as important as the institution of marriage without reference to this Legislative Assembly.

Mr. Speaker we were also peppered and still are being peppered with requests from the press asking for a statement. However, as the Hon. Attorney General stated after the judgment was handed down – the ruling required careful consideration by Government. And so the Government has taken the time to consider in its Caucus and the Cabinet to take legal advice and to discuss this most important matter and its implications.

I want to add here that I and my entire government have great respect for the Hon. Chief Justice and indeed the independence of the judiciary. But even the best judges get it wrong from time to time. Hard cases make bad law. None of us who are human are infallible.

Mr. Speaker, the Government believes that in his determination to right what he has described as injustice and indignities suffered by the petitioners in the same-sex partnership case, the Hon. Chief Justice may have exceeded the scope of the powers conferred on the Court by the Constitution and in doing so, some have argued, assumed the role of this Legislative Assembly in deciding on what should be public policy and then legislating for it. Mr. Speaker, the Government is cognizant of

the provisions of Section 5 (1) of the Constitution and the mandatory requirement imposed by that section that all existing laws “shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.” But we believe that introducing the entirely new concept of same-sex marriage into the existing Marriage Law goes way beyond any reasonable interpretation of modification or adaptation. This, we believe, might be inconsistent with the separation of powers by trespassing on the constitutional remit of this Legislative Assembly.

Mr. Speaker, I spent much of the first eight years of my political career on both sides of this House engaged in the efforts to get us a modernised constitution. The previous Constitution Order was made in 1972 and we had outgrown its provisions and a new constitution was desperately needed to catch up with our growth and development as a country.

As early as 2001 the United Kingdom Government made it clear to us that no Constitution would be agreed that did not contain a Bill of Rights. On the other hand, many stalwarts in this community and especially religious leaders were concerned about the implications for the traditional institution of marriage of a Bill of Rights and in particular, what is now Section 16 of the Bill of Rights of our current constitution, which prohibits discrimination on a number of grounds, including sexual orientation. It was plain to the government at the time that we would never get the new constitution approved by referendum unless we were able to satisfactorily address these concerns. So Mr. Speaker we invited representatives of the Cayman Ministers

Association and the Seventh Day Adventist Conference to not just discuss the proposed new constitution with us, but to actually be part of the negotiating team, not just here in Cayman but at the final round of negotiations at Lancaster House in London.

Mr. Speaker, the genesis of Section 14 of the Bill of Rights of the constitution, which was described by Sir Jeffrey Jowell – who led the Government’s team in the case - as the “rock” of the Government’s case, was the concern by the religious community in Cayman to ensure that the institution of marriage, which Christians believe to be God ordained, remained available exclusively to persons of the opposite sex. Thus section 14 (1) provides: “Government shall respect the right of every unmarried man and woman of marriageable age freely to marry a person of the opposite sex and found a family.”

These words are deliberate and were intended to provide the necessary assurances to the Caymanian community, but in particular the Christian community, that the institution of marriage would retain its traditional definition as the union between one man and one woman.

To ensure that there was no question about this, in tandem, this Legislative Assembly amended the Marriage Law in 2008 to define marriage as “the union of a man and a woman as husband and wife”.

I have no doubt, given my intimate and lengthy involvement with these issues during the constitutional discussions, negotiations and amendments that without the

assurances of Section 14 of the Bill of Rights regarding marriage and the amendment to the Marriage Law in 2008 that the 2009 Constitution that we now operate under would not have been approved by referendum.

We also know that the constitutional discussions and drafting did not contemplate that sections 9, 10, or 16 of the Bill of Rights that deal with private and family life, conscience, religion and non-discrimination, would apply to marriage - hence the reason why marriage is in its own separate place, in section (14), in the Bill of Rights.

As the Government submitted to the Hon. Chief Justice during the hearing of the case, Section 14 is the constitutional provision that specifically provides for the right to marry; what the lawyers call the "lex specialis"- that is, the part of the law that governs the specific subject matter of the institution of marriage.

Mr. Speaker, the current constitution is a comprehensive negotiated document, the result of eight years of extensive consultation across the various demographics of the Cayman community; often bitter political differences and very difficult negotiations with the Foreign and Commonwealth Office. It was then approved by the democratic process of a referendum. It is not something that was dreamed up by the Cayman Government. The document strove to represent the strong feelings of the Caymanian community, in particular as regards the institution of marriage.

Given the highly controversial and landmark ruling by the Hon. Chief Justice on March 29th, if left unchallenged, the implications for the Cayman Islands Constitution

are significant and potentially far-reaching and go well beyond the rights of same sex couples.

While a challenge to the ruling is certainly not a decision to be taken lightly given the important human rights concerns raised in the case, the ruling of the Hon. Chief Justice has brought about significant ambiguity surrounding the Constitution and Bill of Rights and the interpretation of and ability of the Court to amend other laws should similar applications be made.

Based on the Executive Summary of the Court's judgment there are three main points of concern which we have identified and the Government, as well as many in this Honourable House, have concerns at this initial stage. There may be other grounds that raise concerns as we further analyze this judgement.

Firstly, the implications of the Court's decision for other types of marriages (for example, polygamous marriage), and whether Government would now be bound to give effect to or recognise such marriages if an application for a marriage licence is made for a man to marry multiple wives.

The second concern relates to the extent of the powers of the Court under section 5 (1) of the Constitution to modify legislation on matters such as the right to marry, bringing into question the appropriate separation of powers under the Constitution and whether by exercising these powers under section 5 (1), the Court has exceeded its mandate under the principle of separation of powers.

A third concern is whether, given the language in section 14 (1) of the Constitution, it was open to the Court to find that the right to marry and found a family, could be located in other rights within the Bill of Rights, namely, sections 9 and 10 of that document.

After very careful consideration of the three main points previously mentioned, the Government is of the view that the issues are of fundamental constitutional importance and therefore it is in the public interest to have them considered and determined by an appellate court. For clarity, I will add that the appeal will not be pursued in the name of the Governor, but as is usually the case in actions by or against the Government, in the name of the Attorney General, and the actual office that made the decision.

Mr. Speaker, let me say here that in appealing the Government is cognizant that there is no guarantee or certainty as to how the Court of Appeal will rule. However, we believe it is critical that the country has the benefit of clarification on these very important constitutional issues.

I wish to note that I am painfully aware that the issue of same sex marriage is an emotive one in our Islands. I am also very conscious that this is an issue with real people who have real lives and there are emotions and feelings involved and that this is not merely some text book case. I and the Government have no intention of causing any harm or hurt to the petitioners but we must ensure that in seeking what

they deem protections and rights under the law that a door is not opened that may impinge on other protections and rights.

As Premier I will state what I have said many times before – I have no doubt that the feelings of the majority of Caymanians are that marriage should retain its traditional and religious definition and meaning, the union of one man and one woman. I recognise that many of the younger generation of Caymanians have differing views on this issue and it is quite likely that in years to come the majority view of Caymanians may change. But such a majority is not evident to any of us here today.

However, I equally want to make it clear that no matter what my own religious beliefs, or indeed the beliefs of the other members of my Government or of this Parliament, as your Premier I also have an obligation under the law and the Constitution, and indeed given my religious upbringing under the teachings of Christ, to ensure that all people, but especially any minority group, regardless of differences, are treated fairly and with respect.

I implore those of us in this House and outside of it to discuss their views freely, but respectfully. At all times we should keep in mind that those in our community who are in same sex relationships, or have family members who they love in such relationships, are like us - made of flesh and blood with feelings and emotions and are not merely stone objects.

Thank you Mr. Speaker.

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