

To: Kenneth J. McGhie
General Counsel
One Judiciary Square,
441 4th Street, NW, Suite 270N
Washington, D.C. 20001

2009 JUN -9 P 1:29

From: Bob Summersgill
3701 Connecticut Avenue, NW #139
Washington, DC 20008



Date: June 9, 2009

Re: Referendum Concerning the Jury and Marriage Amendment Act of 2009

Dear Mr. McGhie:

Please find that the Measure, "Referendum Concerning the Jury and Marriage Amendment Act of 2009," is not a proper subject of referendum as it "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2", as described in D.C. Official Code § 1-1001.16(b)(1)(C).

Chapter 14 of Title 2, commonly known as the Human Rights Act, is very broad and prohibits discrimination in 19 different categories for almost every reason, other than merit. The stated intent of the Council in passing the law in 1974, and reaffirmed by the elected Council under Home Rule in 1977 is stated in § 2-1401.01:

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

The Measure would prohibit the D.C. Government from explicitly providing recognition, and therefore service, programs, and benefits to same-sex couples married in other jurisdictions that are provided to other married couples. Instead of being married as they legally are where the license was issued, the Measure intends to make these couples strangers under the law in the District. The D.C. Council and the Mayor have decided through the Jury and Marriage Amendment Act of 2009 that the on-going lack of explicit recognition of same-sex couples married in other jurisdictions is discriminatory and must end. The Measure would thwart that decision.

The Council of the District of Columbia and the Mayor have in the past decade moved deliberately to remove barriers to marriage equality for same-sex couples. The Council amended the Human Rights Act in 2002 to add § 2-1402.73, "Application to the District government." The

Council removed gender specific language referring to marriage in the Code (e.g. husband and wife) through multiple bills, most notably the Domestic Partner Equality Act of 2006 and the Omnibus Domestic Partnership Equality Amendment Act of 2008. Additionally, the passage of marriage equality laws in Massachusetts, Connecticut, Iowa, California, Vermont, Maine, and New Hampshire have brought to focus the incongruity of Human Rights Act and the lack of explicit recognition of same-sex couples married in other jurisdictions as well as marriage equality in the District.

The Measure would authorize discrimination against same-sex married couples on the basis of sexual orientation, sex, and marital status. The Measure targets homosexuals who have married. "Sexual orientation means male or female homosexuality, heterosexuality and bisexuality, by preference or practice," as defined in § 2-1401.02(28). Another way to describe the discrimination is on the basis of sex. Under the measure, a woman would not have the same recognition of her marriage to a woman—and the benefits and obligations that it provides—as would a man who also married a woman.

There are many ways in which the Measure would "authorize, or have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2." Here are just a few.

Most employers provide benefits including leave, healthcare insurance, and pension that extend to the spouse of the employee. If a couple's marriage is not recognized, then they will not receive these benefits unless the employer creates some other system to grant benefits. The employer would be under no obligation to do so.

The Measure would have the effect of authorizing discrimination prohibited under § 2-1402.11:

(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual:

(1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

The Measure has the effect of authorizing discrimination based on sex and sexual orientation with respect to compensation and privileges of employment.

Many organizations and businesses offer discounts and benefits for married couples that join together. The Measure would make same-sex couples ineligible for these discounts in violation of § 2-1402.31:

(a) General. It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual

or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations;

D.C. Code § 2-1402.73, “Application to the District government” makes explicit that securing the end of discrimination includes actions of the Government:

Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

Specifically, married couples would be denied services, programs, and benefits that the D.C. Government offers to married couples:

- Married couples may visit each other in hospitals. § 32-704.
- Married couples may make medical decisions if their partners are incapacitated. §21-2210.
- Married couples have rights of guardianship and power of attorney. § 21-2043; 21-2065; 21-2068; 21-2113.
- If a person dies, the surviving spouse may claim the remains. § 3-413.
- If a person dies intestate, their spouse inherits the estate. Plus, other rules for bequests and inheritance. § 19-112; 19-113; 19-301; 19-302; 19-305; 19-602.11; 19-602.12; 19-602.15; 19-904; 20-303.
- Employer contributions to health insurance for a spouse are not taxable income. § 47-1803.02.
- Married couples may add each other to the title on their cars without paying additional taxes. § 50-1501.02(e)(4).
- Married couples may add each other to the deed of their homes without paying additional taxes. § 42-1102.
- Transfer of real property between married couples is exempt from taxation by the D.C. Government. §47-902.
- Married couples are responsible for their debts in common. § 46-601.
- Married couples have immunity from testifying against each other, with appropriate exceptions. § 14-306; 14-309; 22-3001(10); 22-3019; 22-3024.
- Married couples have standing to sue for negligence causing death. § 16-2701.
- The D.C. Government will pay 75% of the cost of health insurance purchased by District government employee for their spouse. § 32-706.

- A District government employee shall be granted sick leave when needed to care for a spouse. § 32-705(a); 32-501; 1-612.31; 1-612.32(b).
- A District government employee shall be granted sick leave to care for a minor child of a spouse or to care for the employee's spouse who is on maternity or paternity leave. § 32-705(b); 32-501.
- A District government employee shall be granted funeral leave or annual leave when needed to make arrangements for or attend a funeral or memorial service for a spouse. § 32-705(c); 32-501.
- A District government employee who is adopting or whose spouse is adopting a child shall be granted annual leave or leave without pay to make necessary family arrangements. § 32-705(d); 32-501.
- D.C. employees may use opportunity account funds for their spouse's education or business start-up. § 1-307.68.
- Married couples may contract binding pre-marital agreements. § 46-501; 46-504; 46-505; 46-506; 46-507; 45-508.
- Married couples have rules for distribution of property; alimony; and support if they divorce. § 16-910; 16-911; 16-913; 16-916.

In total, there would be more than 250 rights and responsibilities denied to same-sex couples married in other jurisdictions. Without the Act, they may be considered strangers under the law. Denial of any one of these rights would be sufficient to render the Measure an improper subject referendum per § 1-1001.16(b)(1)(C).

Some, but not all of these benefits and obligations can be accessed through other means. Private contracts and domestic partnerships achieve many of the rights listed above. However, private contracts, such as powers of attorney, wills, and related documents are expensive and do not begin to reach the depth and breadth of the rights and responsibilities of marriage. Marriage is a one stop contract to protect couples that is available for \$45. The limited range of private contracts can cost hundreds to thousands of dollars and not begin to cover the services, programs, and benefits of marriage.

Domestic partnerships also cost \$45, and cover a wide range of the services, programs, and benefits of marriage, but not all such as health and leave benefits offered by private employers. Domestic partnerships do not have the status and respect of marriage and domestic partnerships do not have the universal recognition that marriage confers.

Domestic partnerships are not marriage. They are a separate and unequal relationship that incompletely fills a gap in the discriminatory availability of marriage licenses. In D.C., the domestic partnership law was created and expanded to meet immediate needs, but not as a substitute for marriage.

Domestic Partnerships and Civil Unions have been found to be inadequate in California, Vermont, New Hampshire, and Connecticut. In California, Proposition 8, invalidated their marriage equality law, but it is notable that the legislature twice passed a marriage equality law and the State Supreme Court also found that their domestic partnership law was inadequate for marriage equality. Vermont, New Hampshire, and Connecticut are repealing or phasing out their

Civil Union laws now that they have passed marriage equality laws. A New Jersey commission has found that the Civil Union law is not equal to marriage.

Denial of marriage recognition to same-sex couples, as the Measure would do, is prohibited under the Human Rights Act.

I hope that you will find that the Measure, "Referendum Concerning the Jury and Marriage Amendment Act of 2009," is not a proper subject of referendum as it "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2."

Please let me know if you have any questions.

Thank you.