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June 9, 2009

BY FACSIMILE AND HAND DELIVERY

Kenneth J. McGhie, General Counsel  
District of Columbia Board of Elections and Ethics  
441 4th Street, N.W., Suite 250  
Washington, D.C. 20001-2745

Re: Referendum on Jury and Marriage Amendment Act of 2009

Dear Mr. McGhie:

Section 16(c)(3) of the District of Columbia Election Code of 1955, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.16(c)(3)), allows the Board of Elections to consult with this office to ensure that referendum measures are in the proper legislative form. In addition, you have asked if the proposed measure is the proper subject for a referendum. I have reviewed the proposed referendum for compliance with the requirements of District law, including the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code § 1-204.101 *et seq.*), the Initiative, Referendum, and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.01 *passim*), the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; DC Official Code 1-201.01 § *et seq.*) ("Home Rule Act"), the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*) ("Human Rights Act"), and judicial interpretations of these statutes.

Based on my review of the authorities cited above, it is my opinion that as currently drafted, the proposal is not the proper subject for a referendum under District law because it would authorize, or would have the effect of authorizing, discrimination prohibited by the Human Rights Act. Because this proposal is legally objectionable, it should not be certified as the proper subject for a referendum.

## DISCUSSION

On May 5, 2009, the Council of the District of Columbia approved the Jury and Marriage Amendment Act of 2009. That measure amended District of Columbia law to provide that marriages legally entered into in another jurisdiction by 2 persons of the same sex shall be recognized in the District of Columbia. The act was signed by the Mayor on May 6, 2009. (See , D.C. Act 18-70; 56 DCR 3797). It was transmitted to Congress on May 11, and is projected to become law on July 6, 2009.

According to the summary statement submitted by the proposer, the proposed measure, entitled "A Referendum Concerning the Jury and Marriage Amendment Act of 2009", would:

Allow the voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same sex. A "No" vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

The legislative text of the Referendum asks: "Should Section 3 of the Jury and Marriage Amendment Act of 2009 be approved?" The measure then sets forth the text of section 3 of the act.

The Board's review of Initiative and Referendum measures is governed by the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code § 1-204.101 *et seq.*), and the Initiative, Referendum, and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.01 *passim*) (Referendum Acts).

With certain specific exceptions, the referendum process may be used to suspend acts of the Council of the District of Columbia prior to the act becoming law, according to the provisions of section 404 of the Home Rule Act . The Referendum Acts provide that the Board shall refuse to accept a measure if the Board finds that:

it is not a proper subject of referendum under the terms of title IV of the District of Columbia Home Rule Act, or . . . "[t]he measure authorizes, or would have the effect of authorizing, discrimination prohibited under the Human Rights Act."<sup>1</sup>

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<sup>1</sup>D.C. Official Code § 1-1001.16 (b)(1)(C). The provision prohibiting initiatives and referendums that violate the Human Rights Act was an "outgrowth of proposals by the Gay Activists Alliance." See Committee on Government Operations Staff Draft Committee Report No. 1 on Bill 2-317, the Initiative, Referendum, and Recall Procedures Act of 1978, at 11 (Council of the District of Columbia April 28, 1978). It is designed to "ensure that no initiated measure will establish an affirmative policy in favor of discrimination in this community."

The question presented under the statutory scheme is whether approval of the referendum would authorize, or have the effect of authorizing discrimination prohibited by the Human Rights Act. If it would, the Board must refuse to accept the measure.

**I. THE PROPOSED MEASURE, IF APPROVED, WOULD HAVE THE EFFECT OF AUTHORIZING DISCRIMINATION PROHIBITED BY THE HUMAN RIGHTS ACT AND IS THUS AN IMPROPER SUBJECT FOR A REFERENDUM**

The Human Rights Act of 1977 states that:

It is the intent of the Council of the District of Columbia, in enacting this act, 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 . . . sex, . . . , sexual orientation, gender identity or expression . . .<sup>2</sup>

The Human Rights Act has been described as a broad remedial statute, to be generously construed. *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The D.C. Court of Appeals has also described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotations omitted). *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 685 (D.C. Cir. 2006)

There are at least two sections of the Human Rights Act that would be violated by approval of the referendum – section 231 (D.C. Official Code § 2-1402.31)( prohibiting discrimination in public accommodations); and section 273 (D.C. Official Code § 2-1402.73)(prohibiting discrimination to limit or refuse to provide District government benefits). Any practice which has "the effect or consequence" of violating any of the provisions of the Act is deemed an unlawful discriminatory practice.<sup>3</sup>

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Committee on Government Operations Committee Report No. 1 on Bill 2-317, the Initiative, Referendum, and Recall Procedures Act of 1978, at 10 (Council of the District of Columbia May 3, 1978). The Court of Appeals has considered two challenges brought under the provisions, rejecting one (*Hessey v. Burden*, 615 A.2d 562, 579 (D.C. 1992)), and deciding the other on alternate grounds, see, *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199, 1203 (D.C. 1997) (proposed initiative violated First Amendment).

<sup>2</sup>D.C. Official Code § 2-1401.01.

<sup>3</sup>D.C. Official Code § 2-1402.68.

The D.C. Court of Appeals has held that this "effects clause" of the Human Rights Act imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co.*" *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987). Thus, it is not necessary to show discriminatory intent if the practice at issue has a discriminatory effect. *Ramirez v. District of Columbia*, 2000 U.S. Dist. LEXIS 4161 (D.D.C. Mar. 27, 2000); *see also Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d 1, 30 (D.C. 1987) (The effects clause of the DCHRA prohibits unintentional discrimination as well as intentional.).

Section 231 of the Human Rights Act makes it an unlawful discriminatory practice to, wholly or partially for a discriminatory reason based on the *actual or perceived*: . . . sex, . . . marital status, . . . sexual orientation, gender identity or expression:

(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.

Section 273 of the Human Rights Act provides that it is a violation of the Human Rights Act for the District government to:

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. (Emphasis added).<sup>4</sup>

There are significant rights and responsibilities that inure to married persons that are denied by failure to recognize an out-of-state marriage.<sup>5</sup> Thus, for the District government to deny persons the benefits flowing from marriage on the basis of their sexual orientation or gender identity or expression is contrary to the provisions of the Human Rights Act.

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<sup>4</sup>D.C. Official Code § 2-1402.73. Significantly, section 273 was added to the Human Rights Act after the Dean decision. See, section 2(g) of the Human Rights Amendment Act of 2002, effective October 1, 2002 (D.C. Law 14-189; 49 DCR 6523).

<sup>5</sup>*See, e.g.*, Marriage Law in the District of Columbia, GLAA (noting over 200 rights and responsibilities in the District, and more than 1,000 federal rights and responsibilities of civil marriage that are not available to domestic partners.) <http://www.glaa.org/archive/2004/glaamarriagereport.pdf> *See also Varnum v. Brien*, 763 N.W.2d 862, 903 (Iowa 2009) (Plaintiffs identify over 200 Iowa statutes affected by civil-marriage status.).

**A. By refusing to recognize a valid marriage entered into in another state by a same-sex couple when the District government would have recognized the marriage if entered into by a heterosexual couple, the District government has discriminated on the basis of sexual orientation in violation of the Human Rights Act.**

In *Dean v. District of Columbia*, 653 A.2d 307, 319-20 (D.C. 1995), the D.C. Court of Appeals held that the Human Rights Act did not require the Superior Court to grant a marriage license to a same-sex couple. The matter pending before the Board is distinct from the matter considered in *Dean*. In *Dean*, the court considered whether the District could decline to create or celebrate a same-sex marriage, but did not consider the even more extraordinary action in which the government (or in this case, the electorate) breaks up an existing legal relationship, or refuses to recognize the legal right of persons to remain married solely because of their sexual orientation. This crucial distinction between a jurisdiction declining to create or celebrate a same-sex marriage and refusing to recognize marriages valid in other states has been determined by at least one other state to constitute a violation of that state's law prohibiting discrimination on the basis of sexual orientation.<sup>6</sup>

The salient reasoning employed in *Dean* was that although the general prohibitions of the Human Rights Act against discrimination based upon sexual orientation could apply to the refusal of the District to issue a marriage license to a same-sex couple, the court was not going to presume the Council intended to effect such a "dramatic change" in the law without an express provision in the Human Right Act reflecting that intent.

(W)e cannot conclude that the Council ever intended to change the ordinary meaning of the word "marriage" simply by enacting the Human Rights Act. Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the Human Rights Act of at least in its legislative history . . . We therefor cannot conclude that the Council intended the Human Rights Act to change the fundamental definition of marriage.

*Dean*, 653 A.2d at 320.

Here, however, the same reasoning dictates that the general prohibitions of the Human Rights Act against discrimination based upon sexual orientation should apply because it should not be

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<sup>6</sup>See *Martinez v. County of Monroe*, 2008 NY Slip Op 909, 1 (N.Y. App. Div. 4th Dep't 2008), appeal dismissed 889 N.E.2d 496 (2008), in which the Supreme Court of New York, Appellate Division, distinguishes the New York case of *Hernandez v. Robles*, 7 N.Y. 3d 338 (2006) (which found no right for same sex couples to marry in New York state), and held that the refusal to recognize same sex marriages that were solemnized in other jurisdictions was a violation of the New York Human Rights Law (NY CLS Exec § 296).

presumed that the Council intended to “effect such a dramatic change” as refusing to recognize marriages that have been legally entered into and recognized by other jurisdictions without having expressly stated its intent to do so.

**B. District law has historically recognized marriages that are valid in the place of their celebration.**

Existing District law requires the recognition of marriages that were valid at their place of celebration. Since at least 1901, the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code § 46-401 through 46-404, or the marriage is in violation of the “strong public policy” of the District. *Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942) (validity of marriage determined by law in the state where the marriage occurred); *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951); *District of Columbia. Rhodes v. Rhodes*, 68 App.D.C. 313, 96 F.2d 715 (1938); *Carr v. Varr*, D.C., 82 F.Supp. 398 (1949); *Gerardi v. Gerardi*, D.C., 69 F.Supp. 296 (1946).<sup>7</sup> The District does not have a “strong public policy” against same sex marriages, because it does not have a policy at all. None of the express prohibitions in the Marriage Act apply to a same-sex marriage, and courts do not make public policy.<sup>8</sup>

In *Martinez*, it was alleged that a previous court decision upholding a refusal to issue a marriage license to the state’s residents reflected the public policy of the state, the court reasoned:

*Hernandez* does not articulate the public policy for which it is cited by defendants, but instead holds merely that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York. The Court of Appeals noted that the Legislature *may* enact legislation recognizing same-sex marriages and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff’s marriage is not against the public policy of New York. It is also worth noting that, unlike the overwhelming majority of states, New York has not chosen, pursuant to the federal Defense of Marriage Act (28 USC § 1738C), to enact legislation denying

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<sup>7</sup>This is consistent with the general and apparently universally accepted rule that the validity of a marriage is to be determined by the law of the place of the celebration of the marriage, or the *lex loci contractus*. 2 Beale, Conflict of Laws, pp. 703, 704; 35 Am.Jur.,Sec. 167 et ff., p. 282.

<sup>8</sup>The one provision that was cited by the *Dean* court as potentially applicable has been repealed. See, section 2 of the Marriage Amendment Act of 2008, effective September 11, 2008 (D.C. Law 17-222; D.C. Official Code § 46-403), which eliminated a provision that made illegal “(a)ny marriage either of the parties to which shall be incapable, from physical causes, of entering into the married state.”