**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**OFFICE OF THE ATTORNEY GENERAL**

**ATTORNEY GENERAL**

June 11, 2009

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

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

Dear Mr. McGhie:

This responds to your May 28, 2009 letter, in which you invite comment on whether the proposed measure, "A Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("Referendum"), is a proper subject for a referendum under District law. In my analysis of this issue, I have taken account of the presentations made yesterday to the Board, and I am particularly impressed by the cogent analysis of the issue by Brian Flowers, General Counsel to the City Council.

The following Summary Statement was contained in the Notice of Public Hearing that accompanied your letter:

> The D.C. Council approved "The Jury and Marriage Amendment Act of 2009." The Act would recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same sex.[1] The "Referendum Concerning the Jury and Marriage Amendment Act of 2009" will 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

[1] Section 3(b) of the Jury and Marriage Amendment Act of 2009 ("Amendment Act"), signed by the Mayor on May 6, 2009 (D.C. Act 18-70; 56 DCR 3797), would amend Chapter Forty-Three of An Act To establish a code of law for the District of Columbia, approved March 3, 1901, 31 Stat. 1391, D.C. Official Code § 46-401 *passim* (2005 Repl.), by adding a new section 1287a to read as follows:

> Sec. 1287a. Recognition of Marriages from Other Jurisdictions. A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by sections 1283 through section 1286 [D.C. Official Code §§ 46-401 through -404], and has not been deemed illegal under section 1287 [D.C. Official Code § 46-405], shall be recognized as a marriage in the District.

> sex. A "No" vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

Specifically, then, the issue to be decided here is whether the proposed Referendum, which would suspend section 3(b) of the Amendment Act, may lawfully be the subject of a referendum under District law. For the reasons that follow, the question must be answered in the negative, and, therefore, the proposed measure is improper.

Discussion

A referendum may be used to suspend acts of the Council. *See* section 2(b) of the Initiative, Referendum, and Recall Charter Amendments Act of 1977 ("Charter Amendments Act"), effective March 10, 1978, D.C. Law 2-46, D.C. Official Code § 1-204.101(b) (2006 Repl.),[2] which defines "referendum" as follows:

> The term "referendum" means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.[3]

Here, except for a marriage that is expressly prohibited or deemed to be illegal under the D.C. Official Code,[4] section 3(b) of the Amendment Act would operate to recognize as valid in the District a marriage legally entered into in another jurisdiction between 2 persons of the same sex.[5]

Inasmuch as section 3(b) was added as part of an amendment after the bill was passed by the Committee on Public Safety and the Judiciary, the committee report is silent with respect to the Council's underlying intent. However, on the same day that the Council passed the Amendment Act, it also passed the Domestic Partnership Judicial Determination of Parentage Amendment

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[2] The District of Columbia Home Rule Act did not initially confer the rights of initiative or referendum upon the voters. These rights were later granted by the Charter Amendments Act. *See Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991).

[3] Section 2(11) of the Initiative, Referendum and Recall Procedures Act of 1979 ("Procedures Act"), effective June 7, 1979, D.C. Law 3-1, D.C. Official Code § 1-1001.02(11) (2006 Repl.), contains a substantively similar definition. As its title suggests, the Procedures Act sets out the procedures that a referendum proposer must follow. *See Atkinson v. District of Columbia Bd. of Elections & Ethics*, 597 A.2d 863, 865 n.7 (D.C. 1991).

[4] *See* legislative text set out in footnote 1.

[5] Currently, the effect of the Act would be to recognize same-sex marriages performed and recognized as lawful in Connecticut, Iowa, Massachusetts, and Vermont, and would, arguably, also extend to same-sex marriages performed in foreign countries. The Act would not authorize the creation of same-sex marriages in the District.

Act of 2009 ("Parentage Act").[6] The Parentage Act, among other things, "establish[es] that a child born to domestic partners has the same parent-child relationship as a child born to spouses." Report of the Committee on Public Safety and the Judiciary on Bill 18-66, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, at 9 (Council of the District of Columbia March 10, 2009) ("Committee Report"). The Council's intent in passing the Parentage Act was "to formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law." *Id.* at 1.

The contemporaneous history of the Amendment Act and the Parentage Act is relevant for purposes of determining the legislative intent behind section 3(b) of the Amendment Act. *See* 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.01 (6th ed. 2000) ("Use of legislative intent as the governing criterion for interpretation focuses attention on circumstances and events at the time when a bill is enacted."). This is especially true where, as here, both acts impact same-sex couples. *See id.* ("Since legislation is addressed to the future, information about contemporaneous and post-enactment facts and developments is relevant to a determination of legislative intent because the legislature must have contemplated the interaction of the new law with such facts and developments....").

Against this background, I conclude that section 3(b) of the Amendment Act is a reflection of the Council's intent to acknowledge as valid in the District yet another aspect of the lives of same-sex couples—their marriages—as long as those marriages were legally entered into where performed and are not otherwise void or deemed to be illegal under District law. *Cf. Dean v. District of Columbia*, 653 A.2d 307, 362 (D.C. 1995) (*per curiam*) (Terry, J., concurring) ("The Council of the District of Columbia can enact some sort of domestic partners law, bestowing on same-sex couples the same rights already enjoyed by married couples, whenever it wants to."); *see also* Committee Report at 1 (Parentage Act "continues the District's longstanding policy of equalizing the treatment of spouses and domestic partners under the law").

Cast in other terms, section 3(b) of the Amendment Act gives legislative voice to comity principles. Comity is the "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive and judicial acts." Black's Law Dictionary 261 (7th ed. 1999); *see also* May 14, 2008 memorandum from David Nocenti, then Counsel to New York Governor David Paterson, to agency counsel, at 1 ("In light of [*Martinez v. County of Monroe*[7] and other New York lower court] decisions, agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability.").[8] Of note, for present purposes, comity "does not require recognition of a foreign decree which contravenes the public policy of

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[6] Signed by the Mayor on May 21, 2009 (D.C. Act 18-84; 56 DCR ____).

[7] 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dept. 2008), leave to appeal dismissed, 889 N.E.2d 496 (N.Y. 2008) (holding that a Canadian same-sex marriage between two New Yorkers was entitled to recognition in New York).

[8] A copy of the memorandum can be found at http://www.prideagenda.org/Portals/0/pdfs/Paterson%20memo.PDF (visited June 1, 2009).

the jurisdiction in which recognition is sought." *Butler v. Butler*, 239 A.2d 616, 618 (D.C. 1968); *see also Loughran v. Loughran*, 292 U.S. 216, 223 (1934) ("Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.") (citations omitted)); *Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965) (quoting *Loughran*).

Far from violating any District public policy, section 3(b) of the Amendment Act reflects the Council's continuing sensitivity to the policy of equal treatment embodied in the Human Rights Act of 1977 ("HRA"), effective December 13, 1977, D.C. Law 2-38, D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl. & 2008 Supp.). The Council intended the HRA "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit," including, among other things, sex, sexual orientation, and marital status. Section 101 of the HRA (D.C. Official Code § 2-1401.01); *see also Howard Univ. v. Green*, 652 A.2d 41, 49 n.12 (D.C. 1994) (HRA "primarily designed to protect from invidious discrimination those persons or groups traditionally who have traditionally been subjected to unfair treatment"); *Hastings v. Alexis*, Civil Action No. 89-3346-LFO, 1990 U.S. Dist. LEXIS 7472, at *5 (D.D.C. June 18, 1990) (HRA "undoubtedly an expression of the District of Columbia's firm public policy").

The power of referenda and their exercise are subject to, and must be consistent with, governing statutory provisions in District law, no less so than acts of the Council. *See Hessey v. Burden*, 615 A.2d 562, 576 n.20 (D.C. 1992) ("The analysis applied to laws enacted by legislatures applies similarly to those enacted by referenda and initiatives.") (citing *Convention Center Referendum Comm. v. District of Columbia Bd. of Elections & Ethics,* 441 A.2d 889, 907 (D.C. 1981) (*en banc*)). Here, to the extent that the proposed Referendum would suspend the Council's action to recognize lawful foreign same-sex marriages on the same terms as lawful foreign heterosexual marriages, the proposed measure would run counter to the letter and spirit of the HRA.

Conclusion

As expressed in the HRA, the established public policy of the District of Columbia is to treat individuals as equals, whatever their gender, sexual orientation, or marital status may be. The Council reflected that policy in section 3(b) of the Amendment Act, in a manner consistent with well-recognized principles of comity. The effect of the proposed Referendum, however, would be to negate that action. Therefore, the proposed measure is not a proper subject for a referendum under District law, and the proposer's petition should be denied.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: The Honorable Adrian M. Fenty, Mayor
Bridget Davis, Director, Office of Policy and Legislative Affairs
The Honorable Vincent C. Gray, Chairman
The Honorable Phil Mendelson
The Honorable Jim Graham
The Honorable Jack Evans
The Honorable David Catania
The Honorable Tommy Wells
The Honorable Yvette Alexander
The Honorable Muriel Bowser
The Honorable Kwame R. Brown
The Honorable Harry Thomas, Jr.
The Honorable Marion Barry
The Honorable Michael Brown
The Honorable Mary Cheh