June 24, 1998

To: Trustees of the Office of Hawaiian Affairs

From: Jon M. Van Dyke

Subject: The Proposed Constitutional Amendment that would allow the Legislature to “reserve marriage to opposite-sex couples” (H.B. 117, S.D. 1, C.D. 1)

EXECUTIVE SUMMARY

The Legislature has submitted to the voters in this November’s election a proposed Constitutional Amendment that would add the following new section to Hawai‘i’s Constitution: “The legislature shall have the power to reserve marriage to opposite-sex couples.” If the voters approve this Amendment by a majority vote, it will ensure the constitutionality of H.R.S. 572-1, which states that a marriage “shall be only between a man and a woman.” The proposed Constitutional Amendment would thus prevent the Hawai‘i Supreme Court from ruling that prohibiting same-sex couples from marrying violates the provisions in Hawai‘i’s Constitution (Article I, sections 3 and 5) that ban discrimination based on sex or gender.

Should OHA take a position regarding this proposed amendment?

A strong argument can be made that OHA should oppose this amendment because (1) the amendment would limit the exercise of traditional and customary rights by members of the Native Hawaiian community, and (2) it is important to support other vulnerable groups when their rights are threatened in order maintain the community’s overall constitutional commitment
to equality, nondiscrimination, diversity and aloha that are essential components of the Native Hawaiians' struggle for land, resources, and sovereignty.

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Background. The Hawai‘i Supreme Court ruled in Baehr v. Lewin, 74 Hawai‘i 530, 852 P.2d 44 (1993), that H.R.S. 572-1, which restricts marriage to opposite-sex couples, "establishes a sex-based classification," which is "presumed to be unconstitutional" unless it is "justified by compelling state interests." 852 P.2d at 64, 67. On December 3, 1996, after a two-week trial, Circuit Court Judge Kevin S.C. Chang ruled that the State had not established "the existence of compelling state interests sufficient to justify withholding the legal status of marriage from" same-sex couples. This case is now pending on appeal before the Hawai‘i Supreme Court.

The Hawai‘i State Legislature addressed this question on several occasions, most recently during the 1997 session, when they (a) passed legislation providing many of the financial benefits of marriage to same-sex couples who register as "reciprocal beneficiaries," see H.R.S. sec. 572C, and also (b) proposed the constitutional amendment quoted above which would prohibit same-sex couples from becoming married.

Native Hawaiians Traditional and Customary Rights. Native Hawaiian traditional and customary rights are protected in Hawai‘i’s Constitution and statutes:

Hawai‘i Constitution, Article XII, Section 7: “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.” (Emphasis added.)

H.R.S. sec. 1-1: “The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage...” (Emphasis added.)
These traditional and customary rights are meant to be defined and protected by the judiciary and are not to be interpreted narrowly. The key committee report prepared at the 1978 Constitutional Convention supporting the amendment that became Article XII, Section 7 stated that:

Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts’ unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed. (Emphasis added.)

Standing Comm. Rpt. No. 57, 1 Proceedings of the Constitutional Convention of Hawai`i of 1978, at 640. In its recent decisions, the Hawai`i Supreme Court has sought to identify and protect the traditional and customary rights of Native Hawaiians. See, e.g., Public Access Shoreline Hawai`i v. Hawai`i County Planning Comm., 79 Hawai`i 425, 903 P.2d 1246 (1995), cert. denied, 134 L.Ed. 2d 660 (1996), where the Court found that “[c]ustomary and traditional rights in these islands flow from native Hawaiians’ pre-existing sovereignty,” id. at 449, and held that “legitimate customary and traditional practices must be protected to the extent feasible in accordance with article XII, section 7.” Id. at 451.

An examination of Hawaiian history reveals that Native Hawaiians (along with other Polynesians) participated in a wide range of intimate familial relationships, and thus that a rigid male-female “nuclear family” is not consistent with traditional and customary Native Hawaiian social arrangements. It was (and still is) commonplace for Native Hawaiian children to be raised in a hanai relationship by persons who are not their blood parents. Although Ali`i had ceremonies to mark sexual unions in order to protect genealogies and legitimize heirs, such ceremonies frequently did not limit the sexual options of those who participated in them. And it was not usual for the maka`ainana (commoners) to have such ceremonies -- they “just started living together.” Robert J.
Morris, Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate about Homogamy, 8 Yale J.L.& Human. 105, 129 (1996). Professor Jocelyn Linnekin has described the absence of any formal marriage ceremony — and the absence of any concept comparable to the Western idea of marriage -- in some detail:

Nineteenth-century descriptions suggest that there was no marriage at all for commoner Hawaiians, in the sense of a socially marked, lasting bond between man and woman. Western observers characterized the marital tie as ephemeral and easily broken.... There are no Hawaiian words for husband and wife other than \textit{kane} and \textit{wahine}, man and woman. Testifying in court in 1854..., a Hawaiian woman described the prevailing custom as "\textit{moe aku, moe mai}" (sleep here, sleep there). The Hawaiians’ preference for casual, nonbinding attachments was the bane of the missionaries, who labored mightily to weed out the sin of adultery among the natives. Before the introduction of Christian marriage or, in the words of the nineteenth-century witness, “before the custom of marriage became general,” no formal ceremony marked the union of commoners. More recent studies...also report the looseness of conjugal relationships among Hawaiians.

Jocelyn Linnekin, Children of the Land 61 (1985)(citations omitted)

In addition to their opposite-sex partners, Ali`i frequently also had same-sex partners -- their "aikane" -- and Hawaiian legends and chants are filled with references to these important intimate relationships. It appears to be clear, therefore, that a narrow limitation on the types of intimate relationships that the State recognizes as legitimate would be inconsistent with the traditions and customs of the Native Hawaiian people. See, e.g., Leong v. Takasaki, 55 Hawai`i 398, 410-11, 520 P.2d 758, 766 (1974)(explaining the traditional Native Hawaiian approaches toward adoptions); E.S. Craighill Handy & Mary Kawena Pukui, The Polynesian Family System in Ka`u, Hawai`i 40-74 (9th prtg. 1993)(discussing how kinship in Hawai`i extends far beyond the immediate biological family); 1 Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, Nana I Ke Kumu 49-50 (1972)(explaining Hawaiian concepts of adoption and fostering).

A constitutional provision that denies same-sex couples the benefits that opposite-sex
couples can gain through marriage would be contrary to the Native Hawaiian tradition of recognizing and accepting same-sex relationships. It is reported in 2 Mary Kawena Pukui, E.W. Haertig, Catherine A. Lee, Nana I Ke Kumu 109 (1972), that “[e]ven the critical David Malo wrote that, ‘In ancient times...moe aikane...[was] not considered wrong...[or] regarded as evil’” (quoting from Hawaiian Antiquities at 74). The term “moe aikane” “is a contraction of moe (sleep), ai (coitus), and kane (man). Id. Some writers refer to the aikane relationship as commonplace, extending among Ali‘i well into the nineteenth century. See, e.g., Liliaka Kame‘elehiwa, Native Lands and Foreign Desires–Pahea La E Pono Ai? 47, 157, 160-61, 166 (1992)(discussing the relationship between Kauikeaouli (Kamehameha III) and his half-Tahitian male aikane Kaomi, to whom the Mo‘i gave political power as well as social attention). Another writer has explained the aikane relationship as follows:

Joselyn Linnekin’s research has shown that aikane relationships were recognized at law in probate proceedings as part and parcel of the Hawaiian extended family. Her research also reveals that the Hawaiian concept of “home”...was much more flexible than in the West. Certainly families were united by marriage (alohiki), but also by various forms of adoption (hanai, po‘otua, ho‘okama). In fact, a far more useful concept in understanding the Hawaiian extended family is the ramage (“companions” or “associates”) spoken of so frequently in Hawaiian literature. This analysis reveals how procreation, crucial though it was, was not the sine qua non of marriage or the home, or vice versa....

Robert J. Morris, Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate about Homogamy, 8 Yale J. L. & Human. 105, 133-34 (1996)(citing Jocelyn Linnekin, Sacred Queens and Women of Consequence: Rank, Gender, and Colonialism in the Hawaiian Islands 99-100, 137-52 (1990)). See generally Robert J. Morris, Aikane: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook’s Third Voyage (1776-80)(including excerpts from the journals of Captain Cook and his associates describing the sexual relations between the male Ali‘i and their male aikane). For a description of same-sex relationships

Aikane relationships can be between two females as well as between two males, and the traditional stories of the relationships that Pele and her sister Hi’iaka had with mortal women frequently include descriptions of passionate love-making. See John Charlot, Pele and Hi’iaka: The Hawaiian Language Newspaper Series, 93 Anthropos 55, 71 (1998)(citing a newspaper article written by W.H. Rice on May 21, 1908 in Ka Hoku o Hawaii). A ceremony including the exchange of names frequently marks the acknowledgment of an aikane relationship. Id. (citing a newspaper article written by Ho’oulumahieie on July 11, 1906 in Ka Na’i Aupuni).

Professor Charlot concludes that the word “aikane” was “used for a man who participated in an intense friendship with another man, a relation that included sexual relations. The word was applied to Lesbian friends as well. The word does not necessarily designate an exclusively homosexual person.” Id. at 70 n. 38. He concludes by saying that “depictions of bisexual relationships are not unusual in Hawaiian literature, and the practice was and still is an accepted part of Hawaiian life. Despite all obstacles, traditional attitudes were perpetuated after missionization.” Id. at 71-72.

The proposed Constitutional Amendment would, therefore, amend Hawai‘i’s Constitution in a manner that is inconsistent with traditional and customary Native Hawaiian social arrangements. Some Native Hawaiians seeking to maintain an intimate living arrangement similar to those maintained by Hawaiians in earlier times would be denied the opportunity to have such an arrangement viewed by the State as a “marriage,” with the rights and responsibilities that accompany such a status.

Although the “reciprocal beneficiary” package enacted by the Legislature in 1997, and now
codified in Section 572C of the Hawai‘i Revised Statutes provides many of the financial benefits of marriage to same-sex couples, at least one benefit of importance to Native Hawaiians is not included in this package. Section 209 of the Hawaiian Homes Commission Act allows a “husband” or a “wife” of a lessee to assume the lease of a deceased spouse, and also permits a lessee to designate, in a will, the “widow” or “widower” of the lessee’s children or siblings to assume the lease. This language appears to require a State-sanctioned “marriage,” rather than a “reciprocal-beneficiary” arrangement. Thus, a traditional Native Hawaiian lessee could not pass on a Hawaiian Homestead lease to a same-sex aikane.

Our Constitutional Commitment to Equality, Nondiscrimination, Diversity, and Aloha. It thus appears to be appropriate to oppose the proposed Constitutional Amendment on the ground that it is inconsistent with traditional and customary Native Hawaiian practices. But a more fundamental reason for opposing this proposed Amendment also exists, based on overarching concepts of fundamental fairness and the core Hawaiian concept of Aloha.

As an oppressed, disadvantaged minority group, the Native Hawaiian people have a particular sensitivity to the oppression experienced by other groups. In its efforts to reclaim its lost lands and resources and to reestablish its sovereign nation, the Native Hawaiians will need the support of other groups. These perspectives provide another strong justification for opposing the proposed Constitutional Amendment, and thus standing with the same-sex couples whose rights would be limited by this Amendment.

The Japanese American Citizens League has taken a number of initiatives supporting same-sex couples because of its recognition that it is important to speak out against oppression today, just as it was important to speak out against the internment of Japanese Americans during World War II. If governments can single out one vulnerable minority group for ill-treatment, then it will not be
long before it identifies other vulnerable minority groups for other forms of abuse. Only if all citizens of good will are willing to stand up against persecution will the rights of the most vulnerable groups be protected.

Native Hawaiians have a unique perspective on this issue, because Native Hawaiians are also fighting to restore their rights (i.e., their lost lands and sovereignty), and are seeking the support of other groups for their struggle. Just as Native Hawaiians want others to join with them in their effort, it is important for Native Hawaiians to support the same-sex couples who are seeking equal treatment in our society.

**Conclusion.** To protect the traditional and customary practices of the Native Hawaiian people from further erosion, and to stand with another vulnerable minority group against governmental oppression, it is appropriate for OHA to oppose the proposed Constitutional Amendment that would have the effect of preventing same-sex couples from marrying.