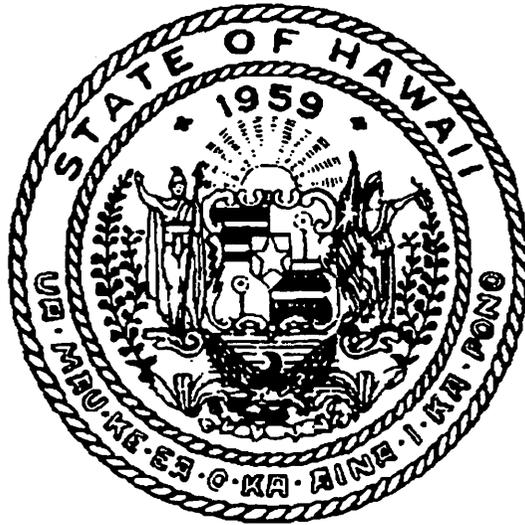


**Report of the Commission  
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and the Law**

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Morgan Britt  
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## SUMMARY

Pursuant to the requirements of Act 5, Session Laws of Hawaii 1995, the Commission met on numerous occasions from late September to early December 1995, received public statements, heard and examined numerous witnesses, and addressed the three tasks assigned to it by that Act. These tasks were, in brief: (1) examining major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples; (2) examining the public policy reasons to extend or not to extend all or some of such benefits to same-sex couples; and (3) recommend legislative action to so extend such benefits. The Commission's tasks and structure arose from several interconnected judicial and legislative actions: the first was the State Supreme Court decision in *Baehr v. Lewin* (74 Haw. 530, 1993); the second was Act 217, Session Laws of Hawaii 1994, in which the Legislature, in reaction to the *Baehr* case, redefined marriage under Chapter 572, *Hawaii Revised Statutes*, as being between a man and a woman and then, interestingly and after the fact, attempted to create a legislative history for this concept; third, the first Commission, set up under Act 217, was unable to complete its work and collapsed because of court challenges to some of its members because of their selection by certain religious organizations; fourth and finally, the present Commission of seven members from the general public was selected according to said Act 5 and appointed by the Governor.

During the course of its work, the Commission identified a substantial number of such major benefits and divided these benefits into three categories: (1) "intangible" benefits related emotionally to the status of marriage, which do not necessarily have an economic value; (2) "quantifiable" benefits which can be tied to monetary amounts; and (3) "general" benefits which may not have major economic value, may be infrequently used, or which may be a combination of smaller benefits. These benefits are listed and described in detail in Chapter 1 of this report.

The Commission in Chapter 2 went on to identify four basic policy reasons why the right to legally marry should be extended to same-sex couples: (1) the denial of such right is a denial of the state and federal constitutional right to equal protection of the law; (2) the state Supreme Court's requirement in the *Baehr* case that the State show a "compelling state interest" for such denial and the reasons advanced by those who support this denial show a close parallel to the landmark case of *Loving v. Virginia* 388 U.S. 1 (1967) in which the United States Supreme Court found a Virginia statute outlawing interracial marriage to be invalid; (3) the argument that same-sex marriage should be barred because it would not lead to procreation was invalid, inconsistent and discriminatory because this standard was not applied to heterosexual marriage; and (4) the religious beliefs of some members of the community which would ban such marriages can certainly be adhered to by those persons or their churches but they cannot be imposed by state law on others who do not subscribe to such beliefs.

Pursuant to its third basic task--to recommend appropriate legislative action to extend such benefits to same-sex couples--the Commission recommends, and the simplest solution would be, amending the marriage statute to allow same-gender marriage and extend all the benefits and burdens of such status to those couples if they wished to assume them. In addition to its first recommendation, the Commission recommends a second suggestion which would be a comprehensive Domestic Partnership law. This law would not solve the question of equal protection because it would stop short of marriage, but it would allow all couples--same gender or opposite gender--to assume most of the rights and obligations of marriage without being married. These options are not mutually exclusive--the Legislature could choose either or both. Draft legislation covering these options is included in the Appendices.

Because of strong differences between a five-member majority of the Commission and the two minority members--Mr. Hochberg and Ms. Sheldon--the majority is submitting the Report of the Commission as outlined above and has asked the minority to prepare a minority opinion which is included in Chapter 5 of the Report.

Where appropriate, the materials in the Appendices attached are noted as pertaining to the Report or to the minority opinion.

This Report is being submitted to the Legislature pursuant to the timetable set forth in Act 5. The next move is up to that body.

## TABLE OF CONTENTS

	<u>Page</u>
<b>SUMMARY</b> .....	iii
<b>ACKNOWLEDGMENT</b> .....	vi
<b>PREFACE</b> .....	vii
<b>Chapter 1. Major Legal and Economic Benefits Extended to Married Opposite-Gender Couples, But Not to Same-Gender Couples</b> .....	1
<b>Chapter 2. Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits in Part or in Total to Same-Gender Couples</b> .....	23
<b>Chapter 3. Appropriate Action Which May be Taken by the Legislature to Extend Such Benefits to Same-Gender Couples</b> .....	35
<b>Chapter 4. Findings and Recommendations</b> .....	43
<b>Chapter 5. Minority Opinion</b> .....	45
<b>Chapter 6. Majority Response to Minority Opinion</b> .....	97
 <b>APPENDICES</b>  	
<b>A. Act 5, Session Laws of Hawaii 1995</b> .....	103
<b>B. List of Hawaii Revised Statutes</b> .....	105
<b>C. Invited Guests</b> .....	127
<b>D. Suggested Legislation</b> .....	133
<b>E. Historical Lessons</b> .....	179
<b>F. Collection of References</b> .....	183
<b>G. Survey of Public Opinion Polls</b> .....	201
<b>H. Written Communications Between Commissioners</b> .....	205
<b>I. Selected Testimony</b> .....	241
<b>BIBLIOGRAPHY</b> .....	285

## **ACKNOWLEDGEMENT**

The Commission on Sexual Orientation and the Law acknowledges the assistance that has been received, and thanks all those who assisted. Amongst those who helped make this report possible are the Hawaii Legislature and Governor, and the Legislative Reference Bureau and its tireless staff, including in particular, Pamela Martin, Esq. The Commission also expresses its appreciation to the many people who testified and provided valuable information and materials, including those who flew from the neighbor islands and even the United States mainland to testify. The Legislative Reference Bureau printed this report as received from the Commission and was not responsible for the editing of the content of this report.

## PREFACE

This report is submitted by the Commission on Sexual Orientation and the Law to the Eighteenth Legislature as requested by Act 5, Session Laws of Hawaii 1995. Act 5 is attached to this report as Appendix A.

### I. Background and Authority

The Commission on Sexual Orientation and the Law was convened by the Legislature to address some of the issues that have arisen in the case of *Baehr v. Lewin*, 74 Haw.530, (1993).

#### A. *Baehr v. Lewin*; An Overview

A lawsuit filed in May 1991 by three same-gender couples against the State of Hawaii, specifically against John Lewin, in his capacity as the Director of Health, complained of an unconstitutional marriage law that prohibited same-gender couples from obtaining marriage licenses. The complaint alleged a violation of the couple's right to privacy and equal protection under the Constitution of the State of Hawaii.<sup>1</sup> The trial court dismissed the case on the pleadings and the couples appealed to the Supreme Court of Hawaii. In May 1993 the Supreme Court reversed the trial court and remanded the case back for trial. Although the Supreme Court found that there is no fundamental right to same-sex marriage under the right to privacy,<sup>2</sup> the court did conclude that the marriage law does deny the same-gender couples equal protection rights in violation of article I, Section 5 of the Hawaii Constitution.<sup>3</sup> The Hawaii Supreme Court held that the discrimination is based on the "gender" of an individual and is a "suspect category." Therefore, for purposes of the equal protection analysis, the marriage law is subject to a "strict scrutiny" test.<sup>4</sup> This places the burden on the State to show that the statute's gender-based classification is justified by compelling state interests

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1. Right to privacy, Article 1, Section 6 of the Hawaii Constitution provides:

"The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The Legislature shall take affirmative steps to implement this right."

Right to Equal Protection, Article 1, Section 5 of the Hawaii Constitution provides:

"No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

2. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) at 74 Haw. 557.
3. *Baehr*, 74 Haw. at 564.
4. *Baehr*, 74 Haw. at 580.

and the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.<sup>5</sup>

## B. Legislative Action

The Legislature reacted to the Supreme Court's decision in *Baehr v. Lewin* by holding public hearings throughout the State in September and October of 1993. At the next legislative session the Legislature proceeded to pass Act 217, Session Laws of Hawaii 1994. Act 217 accomplished several things.

First, Act 217 provided a venue in its purpose section for the Legislature to express its position. The purpose section of Act 217 has been interpreted to create legislative history after the fact while at the same time telling the Supreme Court not to interpret the law in a different fashion. Second, Act 217 also amended the marriage law to specifically require a man and a woman to be eligible for a marriage license, but it did not prohibit the private solemnization of any ceremony. Third, Act 217 created the prior Commission on Sexual Orientation and the Law.

The Commission as created by Act 217 (hereafter the "Act 217 Commission") was an eleven-member Commission that had representatives from an assorted group of organizations, some religious in nature. In December of 1994, a federal lawsuit was filed in United States District Court against the Governor concerning the appointment of certain members of the Act 217 Commission. The suit complained of a constitutional violation that was based on the separation of church and state. Judge Harold Fong ultimately granted the plaintiff's motion to permanently enjoin the participation of those members of the Act 217 Commission who represented the Catholic Diocese and the Church of Jesus Christ Latter-Day Saints.<sup>6</sup> In January of 1995 the eleven-member Act 217 Commission was left with seven members. The Legislature created a new Commission in Act 5, Session Laws of Hawaii 1995 (hereafter the "Act 5 Commission" or simply "the Commission").

## II. The Commission Members

Act 5, Session Laws of Hawaii 1995 specified that a seven-member Commission be appointed by the Governor with at least two members selected from a list from the Senate President and two from a list provided by the Speaker of the House. In early August 1995 the Governor appointed Thomas P. Gill, Chairperson, and Morgan Birtt, Ku'umeaaloha Gomes, Lloyd James Hochberg, Jr., Nanci Kreidman, Marie "Toni" Sheldon, and Robert Stauffer to the Commission. Mr. Hochberg and Ms. Sheldon were selected from the Speaker's list and

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5. *Id.*

6. *McGovern v. Waihee*, United States District Court, District of Hawaii, Civil No. 94-00843, HMF, Jan. 13, 1995.

Mr. Gill and Ms. Kreidman were selected from the Senate President's list. Mr. Britt, Ms. Gomes, and Dr. Stauffer were Governor appointees.

### III. Report Overview

The Act 5 Commission had their first meeting on September 13, 1995. A schedule was submitted and accepted that followed the structure of the authorizing Act, breaking the Commission's work into three tasks. Discussion on each task was planned for one meeting with voting on the issue at another. The Commission met at least every two weeks until the report was finalized December 8, 1995. The accepted schedule was adhered to as closely as possible. In order to stay on schedule and complete the tasks assigned, some meetings had to be recessed and continued to finish important matters on the agenda.<sup>7</sup> In addition, subcommittees of the minority and majority were formed early in November, and each met to expedite the drafting of this report.<sup>8</sup>

All meetings were open, noticed according to the Sunshine Law,<sup>9</sup> and an opportunity for the public to submit oral testimony was scheduled on each agenda. The fact that all meetings were held on Oahu made the participation of citizens of the neighbor islands a concern to the Commission. Several members of neighbor island communities did, at their own expense come to testify, and others submitted written testimony.<sup>10</sup> There were no funds allotted to the Legislative Reference Bureau for the Commission to hold meetings on the neighbor islands. To allow as much participation as possible, the Commission used the State Library System in all counties to disseminate the draft report for public review and comment before finalizing the report.<sup>11</sup>

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7. The full Commission meeting noticed and held on October 11, 1995, continued to October 12; the meeting noticed and held on October 25, continued to October 26, November 1, 2, 6 and adjourned on the 7th; the meeting noticed and held on November 22, continued to November 29, December 4, and adjourned December 6.
  8. The minority subcommittee meeting held on November 9, continued on the 14th, the 15th and adjourned on the 20th. Another minority subcommittee meeting was noticed and held on December 5, 1995. The majority subcommittee meeting noticed and held on November 13, 1995 was continued to the 15th and 16th. A second majority subcommittee meeting was noticed and held on November 30, 1995 and continued to December 5, 1995.
  9. Section 92-7, *Hawaii Revised Statutes* (1993 and Supp. 1995).
  10. See Minutes of October 11, 1995, pgs. T-4 and T-98 for testimony of David Kawate of Kauai; Penelope Spiller of Molokai; Minutes of October 25, 1995, pgs. T-1, and T-2 for testimony of Bruce Fernandes of Maui; Sandra Pelosi of Maui; See minutes of November 8, 1995, pgs. T-86-89 for testimony of Diane Sutton of the Big Island and Martin Rice of Kauai.
  11. A summary of the public response received after the public release of the draft report on November 27, 1995 indicated support of the Commission's work from 455 individuals, 14 organizations and 126 signatures on petitions. Objections to the report were received from 578 individuals, 9 organizations and almost 3,000 signatures on petitions from thirty-two different groups.

Early in the Commission meetings it was apparent that all the findings and recommendations of the Commission would not be unanimous.<sup>12</sup> The majority position was favorable to extending marital rights to same-gender couples in some form. The minority position was against such extension. In order to allow both sides to fully express their positions, it was agreed to allow the minority to prepare and submit a separate chapter. While the minority participated in the discussion of each issue before the Commission, the majority did not interfere with the wording or content of the minority chapter.

The parts of the report coincide with the authorizing Act as to each of the three tasks. Chapter 1 addresses the first task:

"(1) Examine the major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples."

Chapter 2 focuses on the issues surrounding the second task:

"(2) Examine the substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples."

Chapter 3 reviews the different options that were considered by the Commission in the exercise of their final task assigned:

"(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."

Chapter 4 of this report presents the findings and recommendations of the Commission.

Chapter 5 contains the minority opinion in full.

Chapter 6 is a response by the majority of the Commission to the minority opinion.

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12. See votes on motions recording a 4-2 majority in Minutes of September 13, 1995, pg. 3, Minutes of September 27, 1995, pgs. 4, 5 and 12; Minutes of October 11, 1995, pg. 5.

## Chapter 1

### **MAJOR LEGAL AND ECONOMIC BENEFITS EXTENDED TO MARRIED OPPOSITE-GENDER COUPLES, BUT NOT TO SAME-GENDER COUPLES**

The Commission approached their first task to

**"(1) Examine the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples;"**

by reviewing the Hawaii Supreme Court decision in *Baehr v. Lewin*, inviting various speakers to testify, and reviewing the work of the former Act 217 Commission.

#### **I. Supreme Court and Act 217 Commission's Work**

The Supreme Court of the State of Hawaii identified fourteen different "salient marital rights and benefits" in the *Baehr* decision.<sup>13</sup> This served as the starting point for the Act 5 Commission.

The Act 217 Commission had started identifying specific statutes that conveyed benefits but did not complete their review of the entire *Hawaii Revised Statutes*. The Legislative Reference Bureau completed the analysis and submitted and distributed to Commission members a memorandum identifying thirty-seven areas of the law (including the fourteen previously identified by the Supreme Court) which may confer major legal and economic benefits.

#### **II. Invited Guests**

The Commission invited several individuals to speak to them regarding their opinions on the legal and economic benefits of marriage. The speakers represented a range of expertise including economists, a professor of tax law, representatives from the Employees Health Fund and the Employees' Retirement System, as well as the attorneys representing the parties in the *Baehr v. Lewin* case. Others were invited but could not attend. A list of invited guests for this topic as well as other topics appears in Appendix C.

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13. "Although it is unnecessary in this opinion to engage in an encyclopedic recitation of all of them, a number of most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, under *HRS*, chapter 235 (1985 and Supp. 1992); (2) public assistance from and exemptions relating to the Department of Human Services under *HRS* chapter 346 (1985 and Supp. 1992); (3) control, division, acquisition, and disposition of

### III. Terminology

An important terminology modification made by the Commission should be noted. In an effort to be more precise and avoid confusion, the term "sex" has been replaced with the term "gender".

#### A. The Definition of Major Legal and Economic Benefit

The Commission's task includes examining major benefits, necessitating understanding the meaning of that term. As it was not defined in the legislative history, the Commission adopted the common rule of interpretation that the words of law are generally to be understood in their most known and usual significance.<sup>14</sup> Using this general understanding rule for the definition of "major" is similar to the reasoning applied by the Supreme Court of Hawaii in identifying some of the "most salient" benefits of marriage which relied on a combination of legal and economic factors.<sup>15</sup> This definition would necessarily include a range of benefits from those of lesser direct economic value, but of major emotional importance, to those with great economic value and of major importance.

This definition of major legal and economic benefit has been the subject of vigorous debate. Act 5 differs from Act 217 with regard to the first defined purpose of the Commission by replacing the word "precise" with "major."<sup>16</sup> Without direct legislative intent this proved to be a controversial topic. Several objections to the definition, together with several alternative approaches to resolving this issue were examined.

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community property under *HRS* chapter 510 (1985); (4) rights relating to dower, curtesy, and inheritance under *HRS* chapter 533 (1985 and Supp. 1992); (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, *HRS* chapter 560 (1985 and Supp. 1992); (6) award of child custody and support payments in divorce proceedings under *HRS* chapter 571 (1985 and Supp. 1992); (7) the right to spousal support pursuant to *HRS* section 572-24 (1985); (8) the right to enter into premarital agreements under *HRS* chapter 572D (Supp. 1992); (9) the right to change of name pursuant to *HRS* section 574-5(a)(3) (Supp. 1992); (10) the right to file a nonsupport action under *HRS* chapter 575 (1985 and Supp. 1992); (11) post-divorce rights relating to support and property division under *HRS* chapter 580 (1985 and Supp. 1992); (12) the benefit of the spousal privilege and confidential marital communications pursuant to Rule 505 of the Hawaii Rules of Evidence (1985); (13) the benefit of the exemption of real property from attachment and execution under *HRS* chapter 651 (1985); and (14) the right to bring a wrongful death action under *HRS* chapter 663 (1985 and Supp. 1992)." *Baehr*, 74 Haw. at 560, 561.

14. See Minutes of October 25, 1995, referring to section 1-14, Hawaii Revised Statutes (1993) as the authority for this point.
15. See Note 13 and Minutes of October 25, 1995.
16. Compare Act 217, Session Laws of Hawaii 1994:

"(1) Identify the precise legal and economic benefits to married couples that

## MAJOR LEGAL AND ECONOMIC BENEFITS

A draft list of major legal benefits was generated by the Legislative Reference Bureau using the definition of the Act 217 Commission.<sup>17</sup> This definition necessarily included benefits that could be obtained through other means in the law but accounted for "lazy spouse" benefits which referred to instances where if no action is taken the benefit automatically inures to the spouse. It also included a benefit even if a burden was attached to it.

A second definition was suggested that would operate to exclude a statute as bestowing a benefit if that benefit could be obtained by other avenues in the law.<sup>18</sup> In other words, if it costs \$50 to change your name if you are a same-gender couple, but it is free if you are legally married, then this \$50 marriage benefit should not be counted as it is technically not prohibited for same-gender couples who want to change their names and are willing and able to pay.<sup>19</sup> It is the opinion of both the minority and the majority that to determine whether there is a major legal and economic benefit you necessarily have to include the balancing of any burden. Where the minority differed was in application of that principle. In a definition that was rejected twice by the majority,<sup>20</sup> the minority would like to apply a four-step analysis to their definition that is structured as follows:

- (1) Does the statute in question create a significant improvement in condition or advantage for a married couple as a result of holding the status "spouse" or "family"? If yes, then
- (2) Is there any burden associated with that significant improvement in condition or advantage? If no, then go to question (4); if yes then

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are not extended to same-sex couples."

with Act 5, Session Laws of Hawaii 1995:

- "(1) Identify the major legal and economic benefits to married couples that are not extended to same-sex couples."
17. The specific definition of the Act 217 Commission is "Anything contributing to an improvement in condition or an advantage that a married couple would have as result of holding the status "spouse" or "family" that would not be offered to a same-gender couple even though they had the same commitments to each other as a married couple." *Interim Report of the Commission on Sexual Orientation and the Law*, January 17, 1995, pg. 2.
18. The specific definition proposed by Commissioner Hochberg is: "A resultant significant improvement in condition or resultant significant advantage, after consideration of concomitant burdens, which a married couple enjoys as a result of holding the status "spouse" or "family" that would not be either offered to a same-sex couple nor available to a same-sex couple by another avenue or means." See Minutes of September 27, 1995, and Minutes of October 11, 1995.
19. Under minority reasoning, the Hawaii Supreme Court would be in error for including the name-change as a "most salient" benefit of legal marriage. See also Note 13.
20. See Minutes of October 11, 1995, pgs. 5 and 18.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

- (3) After considering the burden associated with the improvement in condition or advantage, is the remaining improvement in condition or advantage still significant? If yes, then
- (4) Is that remaining significant improvement in condition or advantage not offered to a same-sex couple nor available to a same-sex couple by another avenue or means?

The majority considered this definition. But when the Commission applied this formula to the fourteen marriage benefits identified by the Supreme Court, not one would qualify as a benefit. Therefore, this formula was rejected as flawed.

One economist defined "major economic benefit" as a large benefit to a large group of people as distinguished from a large benefit to a small group of people,<sup>21</sup> or small benefits or infrequent large benefits to a small group of people.<sup>22</sup> A second economist approached the topic by attempting to calculate the benefit to society from extending benefits to same-sex couples.<sup>23</sup> That analysis did not address the direct benefit to an individual but instead included calculations that took into account the probability of a member of the public actually taking advantage of a particular benefit, which greatly reduced its economic value. This made it difficult to compare and contrast their testimonies, as they approached the topic from different points of view, somewhat like comparing apples with oranges. For example, in analyzing what the economic benefit of offering a resident tuition to the spouse of a non-resident University of Hawaii faculty member, Dr. Moheb Ghali took the differential value of the tuition, \$1,500, and then multiplied it by the probability of someone taking advantage of the benefit, which is one in a thousand ( $1500 \times .001$ ), and arrived at a \$1.50 value for that benefit. Dr. Ghali further discounted the value of a resident tuition to a nonresident spouse over a five-year period and arrived at a present economic value of ninety-six cents.<sup>24</sup> The distributive expected value economic analysis of Dr. Moheb Ghali may be accepted economic practice, but Dr. Ghali's "barricade of abstraction that separates us from economic reality"<sup>25</sup> does not consider the direct benefit to the individual, and therefore the Commission has

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21. Section 11-204, *Hawaii Revised Statutes* (1993 and Supp. 1995), was used as an example of this. This allows a candidate for public office to receive not more than \$50,000 from an immediate family member; otherwise contributions are limited to \$2,000, \$4,000, or \$6,000 per individual. See Minutes of September 27, 1995, for testimony of Sumner La Croix, Ph.D.
  22. Section 304-4(b), *Hawaii Revised Statutes* (1993 and Supp. 1995), authorizes a non-resident university employee's spouse to qualify for a resident tuition.
  23. See Minutes of the October 11, 1995, pg. T-34 for testimony of Moheb Ghali, Ph.D., and attached in Appendix I.
  24. *Id.*
  25. Cobb, Clifford, Ted Halstead and Jonathan Rowe, "If the GDP Is Up, Why Is America Down?" *The Atlantic Monthly*, October 1995, pgs. 59-78.

## MAJOR LEGAL AND ECONOMIC BENEFITS

rejected his economic valuations. Dr. Sumner La Croix's analysis would value this benefit at the full differential. While he recognizes that it is likely that there will be only a few instances in a year, he also states that "the sum of these numerous small benefits can be quantitatively significant."<sup>26</sup> The Commission agreed that to some people the sum of many of these small benefits or just one may create a major benefit.<sup>27</sup>

### B. Balancing the Burdens Against the Benefits of the Marriage Law

The public testimony of both economists and the professor of law<sup>28</sup> brought out that it would be unfair or an incomplete review if the examining of benefits was not weighed with any correlating burdens. The Commission did not disagree and, while no formal motions were made, it was accepted that the burdens would be addressed at the appropriate time. The double-edged sword of marriage rights and benefits versus the burdens and obligations appears particularly in the arena of determining the economic value of benefits.

### C. Economic Values

The economic values of each benefit received great attention by the Commission. Attempting to quantify the exact value of every benefit was impossible, as was pointed out by both economists who testified before the Commission. Even between economists there appeared to be some difference in what to measure, the value of the benefit to the individual, or the value to society of the benefit extended to the individual.<sup>29</sup> The Commission was able to categorize benefits into three categories:

#### 1. Intangible Benefits

Intangible benefits were defined by the Commission to include the legal benefits that are often closest to the hearts of the affected couples who are denied the right to marry.<sup>30</sup> These types of benefits are not associated with any monetary value. Quantifying the values of intangible benefits is often left to juries in civil proceedings.

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26. See Minutes of September 27, 1995, pg. T-10 for testimony of Sumner LaCroix, Ph.D. and Lee Badgett and attached in Appendix I.

27. See Minutes of September 27, 1995.

28. See Minutes of September 27, 1995, for testimony of Sumner La Croix, Ph.D., and Randall Roth, Esq., and Minutes of October 11, 1995 for testimony of Moheb Ghali, Ph.D.

29. Compare the testimony of Sumner La Croix on pg. 243 of this report, an excerpt of the Minutes of September 27, 1995 and testimony of Moheb Ghali, on pg. 269 of this report, an excerpt of the Minutes of October 11, 1995, in Appendix I.

30. See Minutes of October 25, 1995.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

### 2. Substantial-Quantifiable Benefits

A second category of benefits was defined as substantial-quantifiable benefits. Benefits in this category are generally tied to monetary amounts. This type of benefit is also the type that usually has a burden associated with it.

### 3. General Benefits

General benefits are defined as a catch-all for benefits that do not fit into the categories above. General benefits may not have a major economic value or are used infrequently although they may have a major impact on an individual couple. In addition, general benefits can refer to the sum total of smaller benefits that may have a major impact on an individual couple.

### D. Other Jurisdictions and Dependent Benefits

The Commission could not ignore all the benefits that are reliant on the State's definition of marriage. When the State defines a spouse it has the effect of pushing the first domino in a parade of dominos. The marriage certificate affects issues under county ordinances, other state laws, federal laws and regulations,<sup>31</sup> international treaties,<sup>32</sup> as well as issues in private industry. While the Commission recognizes many possible reactions in other states and in the federal jurisdictions to allowing marital status to same-gender couples, such reactions cannot be accurately predicted. Further, it is not the Commission's task to analyze such reactions, and many would be based on private litigation. Rather, it is the Commission's task to recommend what will best serve the public interest and the private rights of people in Hawaii. While exploring all these benefits is beyond the scope of this Commission's assigned tasks, the Commission did hear a considerable amount of

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31. See Minutes of September 27, 1995, pg. T-14, for testimony of Sumner La Croix, Ph.D. and pg. T-23, for testimony of Randall Roth, Esq., citing benefits in the estate tax area, social security programs, and federal immigration law.

32. See the following excerpt from the Minutes of October 25, 1995:

#### "International Implications

It is understood that most nations of the world bestow special rights and benefits, or allow special benefits to be chosen, by persons who are recognized as having a government marriage certificate. It is likewise understood that these foreign countries generally recognize U.S. marriage certificates. Finally, it is understood that under the American federal system of governance, the actual issuance of U.S. marriage certificates is done by the individual states, including Hawaii.

As such, it can be persuasively argued that the conferring of a marriage certificate by the State of Hawaii carries with it certain major legal and economic benefits in these foreign countries, should a couple with such a marriage certificate visit or otherwise have dealings with such foreign countries. But these major legal and economic benefits are all subject to the applicable provisions of international law, any other applicable treaty provisions that each such country has with the United States, and subject

## MAJOR LEGAL AND ECONOMIC BENEFITS

testimony<sup>33</sup> with regard to the federal tax system, and as our state tax system is based on the Internal Revenue Code,<sup>34</sup> the essence of that discussion is included in this report.

Regarding tax issues, both economists and the professor of tax law agreed that the tax law can carry a marriage "bonus" or a marriage "penalty" and was strictly dependent on individual fact situations.<sup>35</sup> For example, when married couples have two \$100,000 incomes there is a marriage "penalty," but if the same amount of income (\$200,000) is earned by one married individual with the other married individual as a dependent, there is a benefit of reduced taxes. Combining several ideas suggested by those who testified before the Commission, the benefit may be framed in this particular situation as giving the couple the opportunity to make a choice<sup>36</sup> to select an "economy of the family."<sup>37</sup> This economy of the family issue relates to the decisions families make as to what is the best economic situation for the family. For example, does one spouse work in the home to provide care for children or do both spouses choose to work and pay someone to care for the children. Often these decisions are based on the economic impact of these decisions. For example, will there be higher taxes if both work, or additional costs for health insurance? And what is the cost of a caregiver for a dependent?

The Commission attempted to identify persons in the private industry who would speak on the major legal and economic benefits associated with marriage in the private industry but was unable to. Thus, having no direct testimony related to the benefits in private industry, the Commission did not deal directly with those issues.

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further to any applicable internal laws or judicial decisions within each such country.

An investigation of such international scope has not, to the Commission's knowledge, ever been undertaken. The scale of such a study is also clearly outside of the resources made available to the Commission.

As such, the Commission finds that a persuasive argument exists that many major legal and economic benefits available in foreign countries are conferred on a couple through the State of Hawaii's conferring of a marriage certificate.

At the same time, the Commission finds that a precise listing or valuation of such major legal and economic benefits is outside the scope of its appropriated investigative resources, and therefore outside the scope of this report."

33. See Minutes of September 27, 1995, pg. T-24, for testimony of Randall Roth, Esq., and pgs. T-13 and T-21, for testimony of Sumner La Croix, Ph.D. and the Minutes of October 11, 1995, pg. T-33, for testimony of Moheb Ghali, Ph.D.

34. See section 235-3, *Hawaii Revised Statutes* (1993) and generally, see sections 235-2.3, 2.4 and 2.5, *Hawaii Revised Statutes* (1993 and Supp. 1995).

35. *Id.*

36. See Minutes of September 27, 1995, pg. 9.

#### IV. Conclusions

After reviewing the variety of definitions for major legal and economic benefits, a majority of the Commission decided not to view this definition as a static formula to be applied mechanically to each statute but instead to adopt a concept that would provide guiding principles to help clarify and identify the major legal and economic benefits to the Commission. This concept is similar to the reasoning applied by the Supreme Court of Hawaii in identifying "most salient" rights. And the Commission, as did the Supreme Court, relied on a combination of legal and economic factors in arriving at the list of major legal and economic benefits extended to opposite-sex couples but not to same-sex couples. The major legal and economic benefits identified by the Commission included benefits from the three categories of economic value benefits.

##### A. Intangible Benefits

Intangible benefits, as explained earlier in the text, often have almost no real economic value. While they cost nothing in terms of burdens on the State, ironically some of them involve some cost to the individual spouse. The intangible benefits identified by the Commission as major legal and economic benefits are the right to visit a spouse in the hospital,<sup>38</sup> to make decisions regarding the medical use of a spouse's body,<sup>39</sup> to decide the final disposition of a spouse's body,<sup>40</sup> to receive legal notice of certain proceedings in law,<sup>41</sup> the right of spousal privilege and confidential marital communications under the rules of evidence,<sup>42</sup> the extension of the physician-patient privilege to family members,<sup>43</sup> and above

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37. See Minutes of October 11, 1995, pg. T-32, for testimony of Moheb Ghali, Ph.D. describing family decisions to join the work force and be entitled to health insurance.
  38. While this benefit has no statutory citation it is well-accepted policy of many hospitals to allow only family members to visit seriously ill patients.
  39. Section 327-5, *Hawaii Revised Statutes* (1993), relying on section 327-3, *Hawaii Revised Statutes* (1993), for authorized personnel for that decision.
  40. Section 346-15(d), *Hawaii Revised Statutes* (1993).
  41. See sections 334-60.4, 334-60.5, 334-125, and 334-134, *Hawaii Revised Statutes* (1993 and Supp. 1994) (notice for involuntary hospitalization for mental health reasons); section 346-71, *Hawaii Revised Statutes* (1993) (notice required for proceedings for order for immediate protection to spouse).
  42. Section 626:1-505, *Hawaii Revised Statutes* (1993).
  43. Section 626:1-504, *Hawaii Revised Statutes* (1993).

## MAJOR LEGAL AND ECONOMIC BENEFITS

all, the simple recognition and equality<sup>44</sup> that is bestowed by section 572-1, *Hawaii Revised Statutes*, the requisites to enter into a valid marriage contract.

### B. Substantial-quantifiable Benefits

The second category of major legal and economic benefits were identified in terms of substantial-quantifiable benefits and contained fourteen different areas in the law. They are

1. Spousal and dependent support benefits
2. Health insurance benefits
3. Other insurance benefits
4. Retirement benefits
5. Workers compensation benefits
6. Wrongful death benefits
7. Hawaiian home lands surviving spouse benefit
8. Savings in "creating the relationship" benefits
9. Income-tax rate benefits
10. Other income-tax benefits
11. Estate and transfer-tax benefits
12. Transfer of home and capital-gains-tax benefits
13. Tenancy by the entirety benefits
14. Federal benefits

These major legal and economic benefits in the substantial-quantifiable category have economic values attached to them that can be quantified. Where feasibly possible, in terms of the actual amount of the benefit to the individual, the value is attached. The economic valuation as analyzed by Dr. Sumner La Croix is accepted because Dr. La Croix's analysis considers the direct benefit to the individual. The Commission identified the following major legal and economic benefits in this category:

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44. See excerpt from the Minutes of October 25, 1995:

"The Commission further finds that beyond the specific intangible benefits

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

### 1. Spousal and Dependent Support Benefits

The Commission identified the group of spousal and dependent-support benefits as major legal and economic benefits. This package of major legal and economic benefits is usually made available to only one spouse. Through the government's enforcement of the marriage law, one spouse will benefit while a burden is placed on the other spouse. That is to say, by the couple agreeing to the terms of the marriage contract, they are each agreeing to support the other spouse. The Commission notes that of the fourteen "most salient" benefits identified by the Supreme Court of Hawaii, six are included in the benefits identified in this group as spousal and dependent support benefits.<sup>45</sup> These benefits as identified by the Commission are the control, division, acquisition, and disposition of community property under Chapter 510,<sup>46</sup> *Hawaii Revised Statutes*; the rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, Chapter 560, *Hawaii Revised Statutes*;<sup>47</sup> the award of child custody and support payments in divorce proceedings

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listed above is one other that stands head and shoulders above all the other benefits combined. That is the intangible benefit of liberty and equality. What price, what cost, is it to lose equality?

We cheapen the discussion by reducing legal marriage to only a matter of dollars and cents. Certainly the majority of those married couples who are allowed to receive governmental certificates do not view these documents as passports to economic prosperity. We should step back and look at the bigger picture.

What, for example, was the cost in human liberty to be forced to attend segregated schools before *Brown v. Board of Education* 347 U.S.483 (1954)? What was the cost in terms of human equality for different-gender couples to go to jail for marrying the one they loved, before *Loving v. Virginia*, 388 U.S. 1 (1966)?

Add up the hundreds of special marriage-certificate benefits. Now subtract their purely economic value. What you have left is the greatest intangible benefit of all: simple recognition and equality. And the Commission finds that this value is priceless and is above and beyond the other values, intangible or otherwise, simply because the value of legal marriage is greater than the sum of its parts.

Indeed, the Commission finds that this intangible idea of "being really married" through governmental certification--the intangible idea itself, removed from all the purely economic considerations--is one of the primary benefits associated with legal marriage in the minds of most members of the general public. The Commission reiterates its finding: this benefit is of substantial but unquantifiable value."

45. See Note 13.

46. Specifically, sections 510-5, 6, 9, 10, 22, 23, 24, and 25, *Hawaii Revised Statutes* (1993 and Supp. 1995).

47. This includes the benefits of intestate succession because many people do not leave wills. The law then provides for the distribution of the estate to the spouse or other family members and the benefits of elective share for the spouse, the omitted spouse, and exempt property. Specifically, sections 560:2-101, 2-102, 2-202, 2-203, 2-204, 2-205, 2-206, 2-301, 2-401, 2-402, 2-403, 2-404, 2-508, 2-802, 3-101, 2-203, 3-403, 3-703, 3-713, 3-901, 3-902, 3-906, 3-1212, 4-101, 4-207, 5-210, 5-301, 5-309, 5-311, 5-408, 5-410, 5-601, 6-107, *Hawaii Revised Statutes* (1993 and Supp. 1995).

## MAJOR LEGAL AND ECONOMIC BENEFITS

under Chapter 571, *Hawaii Revised Statutes*;<sup>48</sup> the right to spousal support pursuant to section 572-24, *Hawaii Revised Statutes*; the right to file a nonsupport action under Chapter 575,<sup>49</sup> *Hawaii Revised Statutes*; post-divorce rights relating to support and property division under Chapter 580, *Hawaii Revised Statutes*; the right to dower and curtesy under Chapter 533, *Hawaii Revised Statutes*; and the protection of the right to enter into a premarital agreement under Chapter 572D.<sup>50</sup>

### 2. Health Insurance Benefits

The Commission also recognizes health insurance benefits as a major legal and economic benefit. The Hawaii Prepaid Health Care Act<sup>51</sup> mandates that employers provide a minimum package of health insurance benefits to employees who work more than twenty hours per week. The law allows an employer to charge the employee up to 1.5 percent of the employee's wage or salary as payment towards the health insurance premium.<sup>52</sup> A parallel law<sup>53</sup> mandates public employers to provide health insurance benefits. A minimum contribution from the public employers is mandated, with the precise contribution level set by collective bargaining.<sup>54</sup> For most workers, even if an amount is withheld from their salaries, the portion contributed by the employer is still substantial. Some employers in Hawaii in certain situations pay all of the insurance premium, a substantial benefit.

The law requires that the health insurance coverage provided to workers be available to their dependents but does not require the employers to pay for the additional costs of insuring dependents.<sup>55</sup> The payment amount for the coverage of dependents under a group rate is substantially below the cost of getting the insurance independently. This represents a substantial benefit. Assuming one spouse is not working (the dependent spouse) and is eligible for coverage through the other spouse's employer, and assuming the employer contributes nothing to the cost of the dependent spouse's policy, the estimate of the value to the married couple is \$1,251.48 in saved costs by getting insurance at group rates through the employer's plan.

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48. Specifically, section 571-52, *Hawaii Revised Statutes* (1993).
  49. Specifically, sections 575-2, and 3, *Hawaii Revised Statutes* (1993)
  50. Specifically, sections 572D-1, 3, 6, and 10, *Hawaii Revised Statutes* (1993).
  51. Chapter 393, *Hawaii Revised Statutes* (1993).
  52. Section 393-13, *Hawaii Revised Statutes* (1993).
  53. Chapter 87, *Hawaii Revised Statutes* (1993 and Supp. 1995).
  54. Sections 87-4 and 393-19, *Hawaii Revised Statutes* (1993).
  55. Sections, 87-4, 393-7, and 21, *Hawaii Revised Statutes* (1993).

### 3. Other Insurance Benefits

In addition to health insurance benefits, the Commission recognizes other insurance benefits as major legal and economic benefits. The Commission finds that partially by tradition, and partially by legal mandate,<sup>56</sup> insurers in Hawaii have granted certified families discounts for various types of insurance and special considerations of spouses. This may include premium discounts for life insurance, auto insurance, and private disability insurance. The matter is sufficiently complex that the Commission has been unable to further quantify the amount, but the Commission finds that the benefit is substantial and includes it as a major legal and economic benefit.

### 4. Retirement Benefits

The Commission identified two specific major legal and economic benefits in the area of public employee retirement benefits. Retirement benefits are required by law for public workers of the four Counties and the State.<sup>57</sup> The two benefits are (1) retirement health insurance coverage; and (2) death-benefit payments as part of workers' pensions. The marriage bonus arises because these benefits are extended to surviving legal spouses in certain circumstances.

This report addresses retirement health insurance coverage first. If a public worker qualifies for retirement benefits and retires before the age where Federal Medicare benefits become available, that worker is allowed the option of retaining the very comprehensive medical-dental-vision-drug coverage that the worker enjoyed while in active service with the government. Further, the worker's right to extend these benefits to a legal spouse (a right that was enjoyed during active service), is retained: in retirement, the legal spouse is subsidized in his or her comprehensive coverage.<sup>58</sup> One estimate of the value of this benefit is \$1,464 annually.<sup>59</sup>

When the public retiree reaches the age of qualifying for Medicare, the retirement benefit shifts to paying for the "Premium for Part B" fee. This benefit is extended to legal spouses for the full lifetime of the spouse, whether or not the retiree predeceases the spouse.<sup>60</sup> One estimate is that this benefit is worth \$553.20 annually.<sup>61</sup> With legislation presently in Congress to raise the premium cost, and with the public employers committed to

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56. Sections 431:10B-105, 431:10C-103, 431:10D-212, *Hawaii Revised Statutes* (1993 and Supp. 1995).

57. See sections 88-11, 84, 93, and 286 *Hawaii Revised Statutes* (1993 and Supp. 1994) and generally Part III Chapter 88, *Hawaii Revised Statutes* (1993).

58. Section 87-4.5 and 87-6, *Hawaii Revised Statutes* (1993 and Supp. 1995).

59. See Minutes of September 27, 1995, pg. T-33, for excerpt of written testimony of Cenric Ho.

60. *Id.*

## MAJOR LEGAL AND ECONOMIC BENEFITS

covering the cost at whatever level it rises to, this benefit amount is expected to rise over time.

Many private pension plans provide similar coverage for retirees' spouses below the effective age for Medicare, and for retirees' spouses eligible for Medicare coverage. Like the legal mandate for public employees, this traditional coverage is limited to certified spouses. As above, these benefits are substantial.

The second benefit in the public employee retirement area is the death-benefit pension coverage.<sup>62</sup> There are currently two public-sector pension plans, referred to as the "contributory" and "non-contributory" plans. Generally, the former plan covers workers who started prior to the mid-1980s, and the latter plan covers most workers since that time. In general, a contributory plan means the worker contributes to the plan, whereas a non-contributory plan means the worker does not. In both cases the employer makes contributions.<sup>63</sup> The benefits are usually higher for a contributory plan as more payments have been made into it. Over ninety percent of current public pensioners are on the contributory plan, whereas approximately seventy percent of current workers are on the non-contributory plan.

If a worker dies prior to retirement, but the death was an "ordinary" one, in the sense that it was NOT caused by an accident on the job, and the worker was in the contributory plan, there is no "marriage benefit" because the death-benefits are paid to whomever the worker designated as their beneficiary. The beneficiary need not be a spouse or a relative. So, whether legally married or not, a worker has the option of naming a partner or not.<sup>64</sup> If the same ordinary death occurs, but the worker was in the noncontributory plan, however, a marriage benefit clearly exists. In this case, the death benefits are paid to a legal spouse. If there is no legal spouse, then no payment is made unless there are children. However, payments to the children are much lower than to a legal spouse.<sup>65</sup> In other words, the worker has no right to name a beneficiary, and instead is forced to have the primary payments go only to a legal spouse. Furthermore, the value of the death-benefits do not go to

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61. See Minutes of September 27, 1995, pgs. T-11 for testimony of Sumner La Croix, Ph.D.

62. See Minutes of September 27, 1995, pgs. T-26 and T-27, for testimony of David Shimabukuro, Assistant Administrator, Employees' Retirement System of the State of Hawaii.

While the statements and findings of this subsection of the report are those of the Commission, the Commission thanks Assistant Administrator Shimabukuro for his assistance and testimony in helping the Commission deal with this issue.

63. Section 88-123, *Hawaii Revised Statutes* (1993).

64. Section 88-84, *Hawaii Revised Statutes* (1993 and Supp. 1994).

65. Section 88-286, *Hawaii Revised Statutes* (1993 and Supp. 1994).

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

the worker's estate or other heirs if there is no legal spouse or any children as it would in the contributory plan.<sup>66</sup>

The value of this "marriage bonus" is dependent on each worker's particular case. Its exact figure depends on the specific salary conditions of the employee and can be assumed to be a substantial amount of money.

The next type of death benefit is one caused by an accident on the job. In the case of non-contributory members, their benefit is the same as above: the death-benefits are paid to a legal spouse (and children) only. The value is the same as if the worker had died an ordinary death, and is substantial.<sup>67</sup> If the accident-on-the-job death was to a public worker on the contributory plan, however, things are treated differently than if it had been an ordinary death.<sup>68</sup> For an accidental death, the legal spouse gets a death-bonus whether or not the worker named the spouse as a beneficiary.<sup>69</sup> This benefit is a substantial benefit.

In the case of all certified spouses receiving a death-benefit payment, they have the further benefit of rolling the payment amount over into an IRA, while an unrelated recipient of the death-benefit cannot do so and so must pay a sizeable tax penalty. Deferring and reducing the ultimate tax penalty (through use of the IRA option) is an additional substantial benefit for legal spouses.<sup>70</sup>

A full examination of private-sector retirement benefits that includes a marriage bonus is beyond the scope of this report, though it is understood that similar retirement plan benefits exist in private-sector plans and represent substantial and common benefits to certified spouses.

### 5. Workers' Compensation Benefits

The Commission identified major legal and economic benefits in the Workers' Compensation law.

The Commission finds that Hawaii's workers' compensation law allows death benefits to be paid, due to employment-related death, to a dependent certified spouse (or other family members: dependent parent, children, grandchildren). However, these benefits are not paid to an uncertified spouse.<sup>71</sup> These benefits are significant and may equal sixty-

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66. Compare sections 88-84 and 88-286, *Hawaii Revised Statutes* (1993 and Supp. 1994).

67. Section 88-286, *Hawaii Revised Statutes* (1993 and Supp 1994).

68. Section 88-85, *Hawaii Revised Statutes* (1993 and Supp. 1994).

69. *Id.*

70. See the Minutes of September 27, 1995, pgs. T-16, for testimony of Sumner La Croix, Ph.D.

71. See sections 386-34, 41, 42, 43, and 54, *Hawaii Revised Statutes* (1993).

## MAJOR LEGAL AND ECONOMIC BENEFITS

two percent of the worker's weekly wage. This monthly payment to the certified spouse does not end until that spouse's death or remarriage.<sup>72</sup>

### 6. Wrongful Death Benefits

The Commission identified a major legal and economic benefit under the wrongful death law.<sup>73</sup> In a wrongful-death complaint, a legal spouse is allowed to sue for loss of support to the surviving spouse and the loss to the estate. The suit may also attempt to recover damages, including loss of companionship, consortium,<sup>74</sup> and marital care, as well as the expenses of any illness and burial. In most cases, an uncertified spouse cannot sue for support. For example, if someone murders or causes the wrongful death of a spouse, except for any private insurance a same-sex couple may have carried, and except for the extremely limited payments under the Criminal Injuries Compensation law,<sup>75</sup> the surviving partner will get no monetary payment other than charity.

Society has addressed this injustice by allowing legal spouses to bring "wrongful death complaints," which are forms of civil lawsuits, against those responsible for the wrongful death. If the perpetrators are capable of making a payment, and if the lawsuit is successful, the surviving spouse may collect support payments (*i.e.*, payments over time), a lump-sum award for the loss to the person's estate of his or her earning power caused by the death, together with other payments. The precise sum collected would, of course, depend on the cost of support to the surviving spouse, the lost value to the estate (including the earning power of the deceased), the circumstances of the wrongful death, the level of success of the lawsuit, and the amount spent on legal costs for the case. While an exact value cannot be determined, this nevertheless is a substantial benefit. These laws provide this comprehensive form of benefit at no real cost to the government, and the benefit is a significant one.

### 7. Hawaiian Home Lands Surviving Spouse Benefit

The Commission identified a major legal and economic benefit under the Hawaiian Homes Commission Act that provides, upon the death of a Hawaiian Home Lands lessee, a certified spouse can assume the lease if the spouse is qualified by blood-quantum,<sup>76</sup> while a spouse without a marriage certificate cannot.<sup>77</sup> The marriage benefit here depends on having the lessee spouse die while the legal spouse is still living. The value of

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72. Section 386-43, *Hawaii Revised Statutes* (1993).

73. Section 663-1 and 3, *Hawaii Revised Statutes* (1993).

74. Webster's New World Dictionary Third College Edition defines this as "the companionship and support provided by marriage, including the right of each spouse to receive this from the other."

75. Chapter 351, *Hawaii Revised Statutes* (1993 and 1995 Supp.).

76. An inheriting legal spouse need be only 25 percent blood-quantum. See section 209, Hawaiian Homes Commission Act, *Hawaii Revised Statutes* (1993 and Supp. 1994).

the benefit would depend on how many years the surviving spouse lives. One estimate puts the benefit at \$4,812 annually.<sup>78</sup> In any case, it is a substantial benefit.

#### 8. Savings in "Creating the Relationship"

The Commission recognizes that to replicate certain automatic presumptions that a spouse may have under the law, a same-gender couple would have to take extensive legal action. The cost of this legal action, which is automatic on becoming a certified spouse, can be seen as "savings in creating and documenting the relationship." The Commission recognizes this savings to certified spouses to be a major legal and economic benefit.

This package of major legal and economic benefits can be called "creating the relationship." While some of the costs listed in this section refer to benefits that may have been mentioned in other sections, this major legal and economic benefit does not look to the actual legal condition creating the benefit but looks to the cost of setting up the relationship that duplicates the benefit under marriage. There are three costs associated with replicating a certified marriage. First, some of the steps involve paying a government fee (as with the name-change). Second, nearly all the steps require costly legal (or other) services and third, the replication is not always guaranteed. We have placed an undervalued estimate of financial value on this specific marriage-certificate benefits to illustrate what it would cost to replicate the benefits by drawing up documents.<sup>79</sup>

The benefits in this package start with the right to change your name without paying the normal costs of a name-change, \$50 plus \$250 in legal and notice fees.<sup>80</sup> Another item of this benefit is under the probate code where a certified spouse can inherit by intestate succession. In addition, the surviving spouse would be presumed to assume the custody of any dependent children. Non-certified spouses can attempt to replicate this right by each having careful wills and trusts set up by their lawyer(s) at a substantial cost of \$300 for the two wills<sup>81</sup> and \$3,000 for the two trusts. An additional parenting agreement that details what happens if the marriage is dissolved, including the care for children and custody and visitation

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77. Section 209, Hawaiian Homes Commission Act, *Hawaii Revised Statutes* (1993 and Supp. 1994).

78. See Minutes of October 11, 1995, pg. T-34, for testimony of Moheb Ghali, Ph.D., attached in Appendix I.

79. The estimates given in the text are from a local attorney who specializes in this work, and as reviewed by two other attorneys. Actual costs to a couple may vary and could greatly exceed the figures given in the text, depending on the complexity of the couple's estates and other factors.

80. Sections 574-1 and 574-5(a)(3), *Hawaii Revised Statutes* (1993 and Supp. 1995); see also pg. 3 of this report.

81. These costs may be higher. Mr. Martin Rice, a member of the public who testified before the Commission regarding replicating the marriage relationship through legal documents, forwarded a letter from Mr. Daniel J. Custer, attorney for Martin Rice, stating that although Mr. Rice "did a significant portion of the work in drafting the documents...the fee for the preparation of the your estate planning documents was \$796."

## MAJOR LEGAL AND ECONOMIC BENEFITS

rights if the marriage is dissolved, \$500. Durable power of attorney for finances, which allows one spouse to make financial decisions should the other spouse become incapacitated: \$100 each, or \$200 total. A living-together contract, including an agreement about any sharing of finances in the marriage, an agreement about property owned before and during the marriage, and an agreement about disposition of property at (non-legal) divorce: \$2500.

The basic value of a government marriage certificate can be placed at \$6800. An additional point concerning wealth should be made. The duplication of the marriage relationship rights is only to same-gender couples who are wealthy enough to afford a lawyer to draft the documents--in contrast to the poorest opposite-gender couple, to whom these rights are available for the small \$25 fee for a marriage certificate.

### 9. Income Tax Rate Benefits

The Commission agrees with the Hawaii Supreme Court in recognizing that there are several benefits from marriage associated with the income-tax law. The Commission identified the variable tax-table rates as a major legal and economic benefit. While the economic issues in tax law can be complex, the Commission accepts the discussion above with regard to the federal income-tax benefits and recognizes that the individual fact situations under state income tax law may also operate to provide a benefit. While testimony was received by the Commission that the average of the tax effects on all legally married couples in the United States is a marriage penalty of \$4,500,<sup>82</sup> this should not exclude those families who balance the average by enjoying the marriage bonus in their income taxes. These families typically have only one working spouse. In that case a substantial benefit exists. Testimony was also received that perhaps the best way to frame the income-tax benefits with regard to the tax-table rates is to allow a same-gender couple the choice of deciding whether they will receive a marriage bonus or a penalty.<sup>83</sup> The Commission agrees with this testimony and finds that the income-tax law with regard to the variable tax-table rates for same-gender couples and married couples is a major legal and economic benefit.

### 10. Additional Income Tax Benefits

The Commission also recognizes that there are other items in the income tax law that create additional major legal and economic benefits. The Commission finds that certified spouses (who are not claimed as dependents on other tax returns), are automatically given an exemption, while uncertified spouses must meet a much more rigorous test of economic dependency which many certified spouses could not meet. The Commission further finds that if an uncertified spouse's employer offers domestic partner benefits (such as health care or other benefits), the amount paid to the worker for their spouse's benefits are

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82. See Minutes of September 27, 1995, pgs. T-23 to T-26, for testimony of Randall W. Roth, Esq.

83. *Id.*

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

considered part of the worker's income unless the spouse is claimed as a dependent.<sup>84</sup> The amount paid out by employers for certified spouses' benefits, however, is not treated as taxable income.

The Commission further finds that if a marriage dissolves, there are tax advantages if the couple was certified. Alimony payments for (once) certified couples are deductible, and (legal) divorce-related property settlements (such as transfers from one legal spouse to the other) are exempt from capital gains tax (until the certified spouse receiving the property sells it). When uncertified marriages dissolve, these tax benefits cannot be claimed. The Commission finds that these additional tax benefits are a major legal and economic benefit.

### 11. Estate and Transfer Tax Benefits

The Commission identified major legal and economic benefits in the Estate and Transfer Tax Reform Act of 1983.<sup>85</sup> This state estate and transfer tax is based solely on the federal estate and gift tax and as such the allowances and laws regulating those actions directly affect the State's treatment. Under the federal estate and gift tax laws, a legally married person receiving an estate (or total gifts) beyond \$600,000 from his or her spouse does not owe transfer taxes due to the unlimited "marital deduction." Other heirs, including an uncertified spouse, would have to pay estate and transfer taxes on the value of the estate or gifts beyond the \$600,000 ceiling. The generally positive effect of this law for certified surviving spouses is to allow them to defer payment of the transfer tax until their own death. Also, annual gifts beyond \$10,000 to unrelated individuals are taxed; transfers to spouses are not taxed.<sup>86</sup>

In the cases of couples without sizeable estates, the marriage bonus here is irrelevant. But to those couples who are affected, this bonus is substantial, amounting in the hundreds of thousands of dollars (or millions of dollars), depending on their assets.

### 12. Capital Gains Tax Benefit for a Couple's Home

The Commission also identified a major legal and economic benefit on the transfer by death of a couple's home. Couples, particularly homeowners in Hawaii, commonly find their homes (and other assets) to have appreciated enormously over the time they have owned them. Upon the death of one spouse, the general half-ownership of the house (and other assets) are transferred to the surviving spouse. Normally at this time a capital-gains tax (of 45-50 percent between the Federal and State tax systems), would become due on the

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84. Editors, "Benefits for Domestic Partners were Income, *Tax Week*, Report No. 33, August 1994, pg. 3.

85. Chapter 236D, *Hawaii Revised Statutes* (1993 and Supp. 1995).

86. See Minutes of September 27, 1995, pg. T-14, for testimony of Sumner La Croix, Ph.D. and attached in Appendix I.

## MAJOR LEGAL AND ECONOMIC BENEFITS

increase-in-value (capital gain), that belonged to the deceased spouse.<sup>87</sup> Legal spouses may, however, choose to defer the capital-gains tax on the deceased spouse's appreciated assets. This free deferral can continue throughout the remaining life of the surviving spouse. Thus the value of this marriage benefit is two-fold. First, the value of deferring the bill is substantial. Second, the cost of the bill several years from now will not have been adjusted for inflation and so its absolute value will have fallen. The amount of this fall (the discount based on inflation), represents a second substantial benefit.

It is difficult to put precise figures on this benefit as its value depends on the worth of the couple's house (and other assets), and the number of years the surviving spouse remains alive. However, it can be pointed out that all homes in Hawaii have appreciated substantially over time; in the three-year 1988-1990 period, appreciation averaged about \$200,000. Taking this example, if a couple owns a house that went through this appreciation period, then each of their capital-gain was about \$100,000.<sup>88</sup> Upon death, the inheriting spouse, if they did not have the government marriage certificate, could have to pay capital-gains taxes on the deceased spouse's appreciation, a tax which in this case could be \$45,000 to \$50,000.

In the example above, often the the surviving spouse is older and does not have the income or liquid assets to make such a payment. Borrowing on the house may also be difficult as an income stream to service the loan may not be available. The result could sometimes be losing the house to pay the tax. The marriage benefit in this case simply allows the surviving spouse to defer paying this tax throughout the balance of their lifetime. As such, the tax-flow to the government is not stopped but simply delayed. Still, the benefit to the surviving spouse is substantial: not having to pay the tax at once, and therefore possibly not having to lose the house. The precise economic benefit, outside of the human side of not losing the house, would be the value of the tax deferral, which would depend on the circumstances of each couple.

### 13. "Tenancy by the Entirety" Benefits

The Commission was able to identify a major legal and economic benefit that was unanimously agreed to. This benefit is the benefit of ownership under tenancy by the entirety. Only a few states have the form of ownership of real estate known as "tenancy by the entirety." It bestows unique legal protections and benefits on a certified couple. The

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87. Technically, all this falls under the matter of estate taxes, covered above. But that section looked at couples holding sizeable estates, whereas this section looks at the much more common occurrence of a couple in Hawaii that does not have an unusual estate except for the appreciated value of their home.

88. This figure could be substantially more for some couples.

The appreciation amount for a couple that had held their home for a longer period would also have to be adjusted for capital gains or losses over those other years. After all, Hawaii's real estate market has fluctuated over the years and has even lost some value recently for some homes.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

protections and benefits, in turn, cannot be completely replicated by the use of other legal instruments, no matter what price is paid to attorneys in drawing up such instruments.<sup>89</sup>

The Commission also recognizes that tenancy by the entirety is a form of protection of the couple's ownership of their house in times of legal attachment. The economic value is difficult to determine with precision, but the Commission finds that it is a major legal and economic benefit.

### 14. Federal Benefits

The Commission acknowledges that it has previously stated that identifying the benefits beyond the State's jurisdiction is beyond the scope of the task assigned. But as many of the federal benefits are driven by the State definition of marriage, the Commission is obligated to recognize that the State of Hawaii can directly control who is technically certified to receive federal spousal benefits. The Commission therefore finds the State's ability to indirectly award these federal benefits through a valid marriage certificate is a major legal and economic benefit. Specifically these include special spousal rights under the Retirement Equity Act of 1984. This is a "choice" type benefit as the special rights can cut both ways, and the main option of being able to get a certificate is that the couple has the choice of taking out the certificate or not and therefore being covered or not under the REA.<sup>90</sup> Another Federal benefit involves Social Security. Certified married couples receive significant advantages in the nation's Social Security programs, particularly in the size of the monthly benefit amount that is paid under the Old-Age and Survivors Insurance Program (OASI), but also under the Disability Insurance Program.<sup>91</sup>

The benefits from getting a marriage certified in the OASI Program have several sources. First, when a fully-insured worker retires, his or her legal spouse receives a bonus benefit equal to 50 percent of the retired worker's benefit (unless the legal spouse is entitled to a larger benefit based on his or her own work history). In 1993, the average monthly benefit for the covered spouses was \$347, or \$4,164 more than the couple would have received if their marriage were not certified. Second, when the retired worker dies, the surviving certified spouse (from age 60 and up), then receives the retired worker's full benefit. In 1993, the average certified surviving spouse in this program received \$630 per month, or \$7,560 annually, whereas the uncertified surviving spouse receives nothing. Third, when an insured certified spouse dies, the surviving certified spouse is entitled to a one-time death benefit of \$255. Finally, when a currently insured (non-retired) worker dies, the surviving certified spouse is eligible for a monthly benefit if the couple had children who are under age 16 (or disabled), and the legal children of the deceased also receives benefits. In 1993, the

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89. For further explanation of this benefit see *The Encyclopedia of Financial and Estate Planning*, Hawaii Institute of Continuing Legal Education, Honolulu, 1990.

90. This benefit was discussed by Randall W. Roth, Esq., see Minutes of September 27, 1995, pgs. 4 and T-23 to T-25.

91. All figures cited in the following text are taken from the 1994 "Green Book," compiled by the Committee on Ways and Means, U.S. House of Representatives.

## MAJOR LEGAL AND ECONOMIC BENEFITS

average survivor in this category received \$448 per month or \$5,376 annually, and the children in this category received an average of \$173 per month or \$2,076 annually. In these cases, an uncertified surviving spouse and that spouse's children received nothing.

The Disability Insurance system also favors certified couples. If a disabled worker has a legal spouse who is either age 62 or older (or is caring for a young or disabled child of the worker), then the legal spouse is eligible for a benefit that averaged \$156 per month or \$1,872 annually in 1993. For an uncertified couple, the spouse would receive nothing.

More detailed studies of the Social Security system show that over time, the numerous benefits awarded by the system to certified couples are significant. Certified couples, even when both legal spouses work, have rates of return on their Social Security taxes that are two to three times higher than the rate of return earned by non-certified married couples with the same income and taxes paid.

In sum, the OASI tax advantages for certified couples generate significant economic benefits that are worth thousands of dollars annually during retirement. In addition, the payments provided to some legal spouses under the Disability Insurance System provides substantial added financial security benefits when a legal spouse becomes disabled.

### C. General Benefits

The third economic category of benefits, general benefits, consists of a relatively large class of rights that is of limited economic value when applied singly to the couple, but when taken as a package, these rights are major legal and economic benefits. These benefits include the waiver of conveyance taxes between married individuals, even in divorce,<sup>92</sup> allowing the spouse of a non-resident university professor to pay resident tuition fees,<sup>93</sup> allowing a member of the immediate family to contribute up to \$50,000 to a candidate instead of limiting it to the usual \$2,000,<sup>94</sup> certain fishing in Hilo Bay,<sup>95</sup> and statewide fishing for *nehu* and *'iao*.<sup>96</sup>

Appendix B, while not exhaustive, provides a list of four hundred Hawaii laws that bestow intangible, substantive, or general benefits; most of these laws, singly or in groups, fall into the general category. While it is possible to economically assess the value of each of

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92. Section 247-3(4) and (12), *Hawaii Revised Statutes* (1993).

93. Section 304-4(b), *Hawaii Revised Statutes* (1993 and Supp. 1995).

94. Section 11-204, *Hawaii Revised Statutes* (1993 and Supp. 1995). Note that Act 10, Special Session of Hawaii 1995, increased the limits to \$4,000 and \$6,000 for elections to four-year offices.

95. Section 188-34, *Hawaii Revised Statutes* (1993).

96. Section 188-45, *Hawaii Revised Statutes* (1993).

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

the general benefits, the lack of time and funding limited the Commission to examining the substantial benefit list above and not extending the same level of scrutiny to these myriad of general benefits.<sup>97</sup>

A majority of these benefits are conferred on the basis of the definition of *family* or *immediate family*. Some statutes specifically define the term, as in the election law, but others must rely on the statutory rule of construction.

### V. Summary

In summary, the Commission can not claim that the list of major legal and economic benefits that are extended to different-gender couples but are not extended to same-gender couples as identified above is exhaustive. But the Commission finds that it is complete enough to recognize the magnitude of the benefits conferred as result of the privilege to marry under the law. The Commission believes that an overwhelming number of benefits may be taken for granted on a daily basis by state-certified married individuals.

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97. As one example of analyzing a general benefit, careful work between economists and marine biologists could estimate the supply of certain fish in Hilo bay, and of *nehu* and *'iao* fish in waters around the State. It could then be shown that the State laws (sections 188-34 and 45, *Hawaii Revised Statutes*) that deny all non-married families and commercial enterprises the right to fish these species result in the fish supply being therefore relatively high and that the resources of a married couple necessary to invest to catch the fish is relatively low.

## Chapter 2

### **SUBSTANTIAL PUBLIC POLICY REASONS TO EXTEND OR NOT TO EXTEND SUCH BENEFITS IN PART OR IN TOTAL TO SAME-GENDER COUPLES**

Act 5, Session Laws of Hawaii 1995 defined the Commission's second task as follows:

"(2) Determine substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples."<sup>98</sup>

This part of the report identifies the substantial public policy reasons the Commission found to warrant the extension of benefits in total to same-gender couples. Each policy is stated and a discussion of the policy issues follows. The conclusion summarizes these findings.

#### **I. Public Policy**

The Commission listened to many testimonies, reviewed voluminous materials, and discussed different ideas concerning public policy issues. After digesting all this material, the Commission finds that substantial public policy reasons exist to extend all the legal and economic benefits discussed in Chapter 1 to same-gender couples who are willing to enter into the marriage contract, along with all the responsibilities and burdens that contract entails. In that regard, the Commission adopts the following public policies which are related to (1) Equal Protection, (2) the *Loving* case, (3) Procreation and Compelling State Interests, and (4) Separation of Church and State.

##### **A. Equal Protection**

Article I, sections 2, 3, and 5 of the Constitution of the State of Hawaii states clearly that all persons in Hawaii are entitled to equal protection under the law, including the right to enjoy their inherent and inalienable rights to life, liberty and pursuit of happiness, and be free from illegal discrimination or the denial of basic rights on the basis of gender.

The Commission finds that the denial of the benefits of marriage to same-gender couples, purely on the basis of their gender, is a violation of those basic constitutional rights.

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98. Act 5, Section 3, paragraph (2), Session Laws of Hawaii 1995.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

The Commission finds that the Constitutional right to equal protection is central to this marriage debate. The United States Supreme Court has found that under restricted conditions, even prison inmates have a right to marry.<sup>99</sup> The Hawaii Supreme Court has ruled that denying governmental certification to married couples on the basis of gender is discriminatory and presumptively unconstitutional, based on equal protection under the law.

Once the importance of the equal protection argument is made, the Commission finds it beneficial to examine the issue from an alternative perspective. Instead of asking "what reasons exist to extend the benefits identified in Chapter 1 of this report?" it becomes helpful in analyzing the issues to ask "what compelling state interests exist to deny extending these benefits?" This restatement is based on the standard of scrutiny imposed by the court when such rights are threatened in the State of Hawaii. When this standard is established, as in the *Baehr* case, the burden of proof falls on the discriminator to justify the discrimination. While the task assigned to the Commission by Act 5 requires the Commission to determine if substantial public policy exists to extend these benefits, the Commission finds that it is forced to also examine if there are any compelling state interests that exist to deny extending these benefits.

These equal protection arguments are based on the specific language of the State of Hawaii Constitution<sup>100</sup> which is similar to the United States Constitution. The Commission recognizes that the over-riding right that "no person shall be ... denied the equal protection of the laws"<sup>101</sup> is one of the basic liberties we hold to be self-evident. The Hawaii Constitution extends this prohibition of discrimination further than the United States Constitution by prohibiting discrimination based on gender. In Hawaii "No person shall ... be discriminated

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99. "The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Turner v. Safley*, 107 S.Ct. 2254, 2265. [Emphasis added.]

100. See Note 1.

101. Article 1, Section 5, State of Hawaii Constitution; and

Section 1, Article 14, Amendments to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction

## SUBSTANTIAL PUBLIC POLICY REASONS

against ... because of race, religion, sex or ancestry"<sup>102</sup> The Hawaii Constitution strengthened its gender protection with an equal rights amendment that states: "Equality of rights under the law shall not be denied or abridged by the State on account of sex."<sup>103</sup>

In the *Baehr v. Lewin* decision, the Hawaii Supreme Court cited Hawaii's Constitutional guarantees of equal protection in holding that State law prohibiting same-gender marriage is discriminatory and presumptively unconstitutional.<sup>104</sup>

Some public testimony argued that allowing same-gender marriage would give special rights not equal rights. The Commission considered the issue of special rights and agrees that the benefits might appear special because they have not yet been granted to same-gender couples by any state. On closer examination, however, we find that the rights being discussed are important civil rights and the benefits being granted are already available to others, and no special benefit is being contemplated. The Commission recalls the debate over the Civil Rights Act of 1964.<sup>105</sup> Thirty years ago it was thought to be a special right for an African-American person to spend a night in a white-owned hotel in the South or to eat in an all-white restaurant. These are rights that are taken for granted today. The Commission believes that thirty years from now, the majority of citizens will look back on the extension of marriage rights as the right thing to do.

The argument was raised that special rights seem to be some kind of zero-sum game in which granting a civil right to one person somehow takes it away from someone else. The Commission recognizes how allowing same-gender couples to marry may require others to provide services to people who they may wish to exclude. The Commission has considered the weight of this argument. Balancing the level of inconvenience and upset of those who would like to exclude same-gender couples from their businesses based on their personal dislikes or disapprovals, versus providing equal rights to all, the Commission finds the scale tips in favor of equal rights.

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thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of its jurisdiction the equal protection of the laws.

102. Article 1, Section 5, State of Hawaii Constitution.

103. Article 1, Section 3, State of Hawaii Constitution.

104. *Baehr*, 74 Haw. at 557-558.

105. See Marcossou, Samuel A. "The 'Special Rights' Canard in the Debate Over Lesbian and Gay Civil Rights," *Notre Dame Journal of Law, Ethics & Public Policy*, 1995, Vol. 9, No. 1.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

The Commission also considered those arguments that same-gender marriage would infringe on others' individual rights. For example, would an employer, whose religion does not recognize same-gender marriage be obligated to extend the same spouse health-insurance benefits to same-gender married couples as to opposite-gender married couples? Again, we find history instructive: who would say today that an employer, parent or restaurant owner should be able to fire a worker, replace a teacher, or refuse service, based solely on race? If history teaches a lesson, it is that allowing marriage for same-gender couples may enhance society as a whole by moving our nation towards more equal treatment for all.

### B. The *Loving* Case

The Supreme Court of Hawaii, in the case which gave rise to the establishment of this Commission, *Baehr v. Lewin*, 74 Haw. 530 (1993), recognized the relevance of the United States Supreme Court's 1967 decision to strike down a Virginia statute which prohibited miscegenation, or interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967). The Hawaii Supreme Court has found that denial of same-gender marriage was presumed to be a violation of equal protection of the law unless the State could show a "compelling state interest" for such denial. The Commission finds that the various reasons advanced for denying same-gender marriages—including religious, moral and public health and safety—are similar to the *Loving* case and do not constitute a "compelling state interest" and, as a matter of public policy, should not be used to deny equal rights under the law to same-gender couples.

*Loving v. Virginia*, 388 U.S. 1 (1967) has been cited by the Supreme Court of Hawaii in *Baehr v. Lewin*<sup>106</sup> as well as in several testimonies before the Commission.<sup>107</sup> The *Loving* case prohibited the State of Virginia from enforcing laws that discriminated against inter-racial couples who wanted to marry. Some testimony suggested that the *Loving* decision parallels the issues now before the Commission. Some of the arguments were and are imbedded in tradition, separate-but-equal standards, and religious objections.<sup>108</sup>

Other testifiers disagreed, stating that the racial discrimination issues in *Loving* are dissimilar to the gender discrimination issues before the Commission. Clearly, race and gender are different issues. However, closer examination of the broader social debates

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106. *Baehr v. Lewin*, 74 Haw. 530, 562, 563, 567-70 (1993).

107. See Minutes of October 11, 1995 for testimonies of Steven Michaels, Esq. and Daniel Foley, Esq. See Minutes of October 25, 1995 for testimonies of Jon Van Dyke, Esq., Frederick Rohlfing, Esq., and Thomas F. Coleman, Esq.

108. *Loving v. Virginia* 388 U.S. 1, at 3, 7, 8 (1967).

## SUBSTANTIAL PUBLIC POLICY REASONS

reveals that the two issues are similar. There is much to learn from a review of the *Loving* case. The parallels are very strong.

During the 1960's when interracial marriage was becoming more frequent, societal attitudes in Virginia that were based on religion objected to interracial marriage. Public argument also focused on morality issues. A popular view was that it was immoral not to discriminate on the basis of race, in the interests of protecting the children. Fears that children would not be raised in a healthy environment fueled the fire. Discriminating on the basis of race was believed good for the public health because there would be no interracial marriages producing mongrel and weak children. The public supported the most basic defense that the very definition of marriage was a union between those of the same race.

The parallels in this issue to the *Loving* case become obvious when examining the testimony presented to the Commission. The Commission repeatedly heard that some of the State's citizens are in favor of prohibiting same-gender marriage. Objecting to the morality of the behavior of couples who seek marriage certificates, some testifiers believe it is immoral not to discriminate on the basis of gender. Focusing on the ills that would befall children with gay and lesbian parents, some public testimony cited the potential for weak and confused children as dangers to public health and safety, using this as a rationale for discriminating on the basis of gender.<sup>109</sup>

The Commission embraces the lessons of *Loving* and has listened carefully to the testimonies that are rooted in religious, moral and public health ideas. The Commission recognizes the sincerity of all testimony and recognizes that each person has the right to practice their individual religious and moral beliefs. The Commission also recognizes that no one has the right to impose those on others. Additionally, the Commission believes that testimonies stating the extension of benefits to same-gender couples would threaten public health are inaccurate. Both the American Psychiatric Association and the American Psychological Association removed homosexuality from its list of maladies more than twenty years ago. In addition, the Commission heard substantive testimony that children of gay and lesbian parents develop similarly to the children of opposite-sex parents.<sup>110</sup>

Another similarity between *Loving* and the issue before the Commission is the legal non-recognition of an existing situation. Inter-racial relationships, including marriages, existed long before the *Loving* case. The United States Supreme Court officially prohibited Virginia from restricting those inter-racial couples from marrying. The Hawaii Supreme Court has suggested a similar intent here by imposing the heavy burden of showing a compelling state

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109. See Minutes of October 11, 1995, pg. T-23, for testimony of Dan Kehoe, Ph.D., and pg. T-76 for testimony for Mike Gabbard.

110. See Minutes of November 8, 1995, pgs. 2 and T-3 and T-43 for testimony of Dr. Robert Bidwell, and attached in Appendix I.

interest if it is to bar same-gender marriages. Same-gender couples have had relationships that include marriage in some churches.<sup>111</sup> The non-recognition of these on-going relationships warrants a similar standard of scrutiny as in *Loving*. Historically, there was no serious disruption of the public order because of *Loving*. The Commission expects the same result if same-gender marriages are recognized by the State.

Related to the arguments that the public order in Hawaii would be disrupted are the contentions that extending benefits to same-gender couples will wreak havoc on the economic status of the State. Again, we can point to another similarity to the *Loving* case. The State of Virginia feared economic hardship if racial discrimination were ended. The Commission heard substantial testimony on the economic effect on tourism in Hawaii if benefits are extended to same-gender couples. Testimony from economists<sup>112</sup> focused on a *Southern California Law Journal* article.<sup>113</sup> That article projected a \$153 million annual increase in tourism to Hawaii from gay and lesbian couples travelling to the first state that allowed same gender marriage.<sup>114</sup> Even though economists discounted the methodology of the article's author, who is not an economist, they agreed there would be some effect, and two of them estimated the positive effect at \$127 million over five years,<sup>115</sup> though all three economists agreed that a more precise estimate would be difficult to predict without further data. The range of general testimony on how the State will fare economically if same-gender marriage were allowed included a prediction of an economic boost, fear it will create a situation that will destroy tourism in Hawaii, and still others said that the effect would be unnoticeable.<sup>116</sup> The Commission has heard testimony and is aware of the economies of other cities and communities where gay rights have been strongly supported, and understands those areas not to have suffered economically but have even prospered.<sup>117</sup> Therefore, the Commission does not give weight to the argument that tourism will be effected negatively.

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111. A partial list includes Quakers, Metropolitan Community Church, Unity, Universalist-Unitarians, Dignity USA, and Buddhists.
112. See Minutes of September 27, 1995, pgs. T-10 to T-22, for testimonies of Sumner La Croix, Ph.D. and Jim Mak, Ph.D. and Minutes of October 11, 1995, pgs. T-35 to T-56 for testimony of Moheb Ghali, Ph.D.
113. Brown, Jennifer Gerarda "Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage," *Southern California Law Review*, Volume 68, 1995, pgs. 745-839.
114. *Brown* at 755.
115. See Minutes of October 11, 1995 for testimonies of Sumner La Croix, Ph.D. and Jim Mak, Ph.D. and attached in Appendix I.
116. *Id.*
117. Drummond, Tammerlin. "Not in Kansas Anymore," *Time*, September 25, 1995, pgs. 54-55.

## SUBSTANTIAL PUBLIC POLICY REASONS

Discussion of the economic effect on tourism included the introduction of a resolution<sup>118</sup> that explored the results of accepting or rejecting certain public policies. Basically, if a given action by the legislature were to cause loss of jobs or income, it would be opposed as bad for the community and considered a bad policy for the State. Conversely, if such an action created positive conditions for the average citizen, it could be seen as a good policy for the State. Sifting through the testimony, the Commission finds a net positive economic impact from legalizing same-gender marriage and simply recognizes that a new incentive for a particular market to visit the islands would increase the tourism economy of the State. Adopting a policy that would have that result would be good for the State.

Another parallel to *Loving* is the objection that parents would have to send their children to schools attended by the children of parents who are different or to classes taught by teachers who are different. The Commission favors the belief of John F. Kennedy: "If we cannot end our differences, at least we can help make the world safe for diversity."

Regarding the issue of public sentiment, local public polls are mixed, depending on how the survey question is phrased. Although more people might oppose same-gender marriage than support it,<sup>119</sup> about two-thirds of Hawaii's voters support equal rights for its gay and lesbian citizens. But justice may not be reflected in the public polls. At the time of the Supreme Court decision requiring the integration of schools in *Brown v. Board of Education* 347 U.S. 483 (1954) integration was tremendously unpopular. Stubborn governors sent armed troops to prevent children of the "wrong" race from going to school.

Opposition to the 1967 *Loving* decision on interracial marriage was also heated. Yet the Commission also finds no rational argument today that either *Brown* or *Loving* were the wrong things to do. Instead, the Commission finds that both these decisions have provided a more fair and equal life for all Americans. Similarly, testimony indicated that when Denmark passed a national domestic partnership law the majority of the people were against it, but now the law is generally accepted.<sup>120</sup> A time line presented to the Commission indicated movement towards more acceptance throughout the United States of same-gender relationships, with Hawaii being a leader in many of the steps taken.<sup>121</sup>

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118. See Minutes of October 25, 1995.

119. Five Hawaii Polls on Legalizing Same-sex Marriage compiled by an unknown source, attached in Appendix G.

120. See Minutes of September 27, 1995, pg. 7, for testimony of Daniel Foley, Esq.

121. See Minutes of October 25, 1995, for testimony of Thomas F. Coleman, Esq.

C. Procreation and Compelling State Interests

The argument that same-gender marriage should be barred because it cannot lead to procreation is invalid, inconsistent, and discriminatory. Public policy should not deny same-sex couples the right to marriage, and the right to raise a family if they wish to do so, on the excuse that they, between themselves, cannot procreate, when this reason is not applied to opposite-gender couples. State law does not require that opposite sex couples prove that they are capable of procreation before they can be married, and many are obviously not, because of age, medical or other reasons. Individuals in a same-gender marriage may have children from a prior opposite-gender marriage, or can adopt children if they desire a family.

The Commission invited both of the attorneys who will argue at the trial of the *Baehr* case now set for July 15, 1996, to brief the Commission. The First Deputy Attorney General who is defending the State in the Circuit Court trial of *Baehr v. Miike*<sup>122</sup> shared with the Commission the position the Office that the Attorney General will be presenting in the case. The Hawaii Supreme Court has ruled in *Baehr v. Lewin*,<sup>123</sup> that the State has the burden of showing a "compelling state interest" that is narrowly drawn if the State prohibits same-gender couples from obtaining a marriage license. The First Deputy Attorney General has explained to the Commission that the State's position is that a compelling state interest exists that is related to the interest of procreation and protection of children. Their position does not deal with sexual orientation, per se, nor even with gender, per se. Instead, it is based on the belief that being raised by biological parents is best for the children of Hawaii and that is what the marriage law is intended to do.

The obvious question concerns those different-gender couples who apply to get their marriages certified by the government and may not have, intend not to have, or are incapable of having children. The First Deputy Attorney General addresses this issue by appealing to a related defense of privacy.<sup>124</sup>

The Hawaii Constitution has a very strong constitutional protection of privacy.<sup>125</sup> This right of privacy includes the right to privacy in general concerning reproductive matters and

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122. *Baehr v. Miike*, Circuit Court of the First District, State of Hawaii, Civil No. 91-1394-05 is the new caption for the ongoing case of *Baehr v. Lewin* which was remanded for trial by the Hawaii Supreme Court. Since that ruling, the State administration has changed and John Lewin is no longer the Director of Health. The case at trial now has been officially changed and is now captioned as *Baehr v. Miike*. Dr. Miike is the current Director of Health under the Cayetano administration.

123. See Note 122 for the explanation of the difference between the *Baehr v. Lewin* case and the *Baehr v. Miike* case.

124. See Minutes of September 27, 1995, pg. 7, for testimony of Steven Michaels, Esq.

125. Article 1, Section 6, Hawaii State Constitution, see Note 1 for exact language.

## SUBSTANTIAL PUBLIC POLICY REASONS

this is what the First Deputy relies on when explaining the over-inclusiveness of those different-gender applicants under the protections of the compelling state interest that nurtures procreation, who do not want to, or cannot, procreate. With regard to their right to privacy, the First Deputy suggests, it would be unconstitutional to question different-gender couples requesting their marriages to be certified as to whether or not they could or would have children.<sup>126</sup> On the other hand, same-gender couples can not biologically procreate and therefore can be excluded from the marriage law that is rooted in the interest of procreation. The Commission finds this argument to be unconvincing.

The Commission also thinks that due attention should be placed on traditional Hawaiian custom as stated in Section 7, Article XII, State of Hawaii Constitution. "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes..." The Commission recognizes that in traditional Hawaiian culture, a great number of children were raised not directly by the biological parents, but instead by the *hanai* parents. This traditional custom and practice, the Commission finds, is well documented.<sup>127</sup> The Commission concludes that the State's arguments run counter to the Hawaii Constitution and State law cited above, and therefore the argument that children are best raised by their biological parents does not impress the Commission as a compelling State interest.

While the Commission agrees that procreation, the protection of children, and privacy are all in the public interest, the Commission also finds that these same issues argue for the conferring of government certification of same-gender marriages and not against. The encouragement of stable relationships would benefit the individual couples, and the families as well as society. The Commission finds that the continuation of the current same-gender prohibition of state-certified marriage and denial of equal rights is harmful to the public interest.

### D. Separation of Church and State

Under our constitutional government the fact that some religions or churches condemn same-gender marriages does not mean that those religious beliefs can be imposed on others. Our separation of church and state prevents religious enforcement through state institutions, such as the Department of Health.

Representatives from a variety of religious organizations were invited to testify in this area. Clearly, there are as many different opinions on this matter as there are religious

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126. See Minutes of September 27, 1995, pg. 7, for testimony of Steve Michaels, Esq.

127. See for example section 386-2, *Hawaii Revised Statutes* (1993) defining "child" to include a *hanai* child. See also sections 346-71, *Hawaii Revised Statutes* (1993 and Supp. 1995), and section 79-14, *Hawaii Revised Statutes* (1993).

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

organizations. For example, the Church of Jesus Christ Latter-Day Saints and some evangelical and fundamentalist Christian representatives would not like the State to recognize same-gender relationships.<sup>128</sup> Some other Christian representatives and the Buddhists asked the Commission to support stable relationships between loving people regardless of whether those loving people are the same gender.<sup>129</sup>

Some of the public testimony was based on an alleged violation of natural law. Yet conflicting religious testimony stated that same-gender activity can be found in a variety of life forms and therefore is not against natural law. Some Christian testimony said same-gender relations were against God's will and therefore should be banned. Other Christians disagree. Many religions do not recognize God or the one God. Buddhism, the second largest religion in the State, does not believe in God. The Commission finds that the interpretation of various sacred scriptures is open to legitimate differences of opinion but irrelevant to the Commission's purpose. Hawaii welcomes, protects, and cherishes hundreds of different religions and denominations--churches, synagogues, temples, and other places of worship--yet none of these provides the basis of our legal system.

The Commission also listened to Christian testimony that incorrectly interpreted the State motto, "*Ua Mau Ke Ea, O Ka Aina I Ka Pono*," to apply to the issues at hand. Translations of the motto by these public testimonies implied that the common translation "The life of the land is perpetuated in righteousness" refers to pious Christian behavior.<sup>130</sup> The Commission disagrees with this translation of the State motto as having any sectarian meaning. Hawaiian authorities agree that Kauikeaouli (Kamehameha III) is the author of these words. The word *pono* stated in conjunction with the words *ea*, meaning "sovereignty," and *aina*, meaning land, in this context refers to the correct political behavior for protecting the land. Kauikeaouli uttered the statement after the sovereignty of the land was returned on July 31, 1843, by Admiral Thomas.<sup>131</sup>

Other religious testimony feared that the State would force churches to marry same-gender couples, even if that marriage opposed their religious ideology. This is not the current structure of the marriage law, nor would it be if same-gender couples were awarded certificates of marriage. Religious organizations would still be free to exclude those who do

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128. See Minutes of October 11, 1995, for testimony of Father Mark Alexander, Dan Kehoe, Bishop Richard Lipka, Reverend John Boaz, and Chaplain Mary Woodard.

129. See Minutes of October 11, 1995, testimonies of Robert Aiken, Reverend Joris Watland, Diana Paw U, Reverend Bob Nakata, Reverend Donald K. Johnson and Sister Joan Chatfield.

130. See Minutes of October 11, 1995, pgs. 14, 15, and T-92, for testimonies of Leon Siu and Paul Kamanu.

131. Kame'eleihiwa, Lilikala. *Native Land and Foreign Desires: Pehea La E Pono Si?*, Bishop Museum Press, Honolulu, 1992, pgs. 160-161.

## SUBSTANTIAL PUBLIC POLICY REASONS

not share their beliefs, although there may come a time when they become more accepting of same-gender marriages as these become more common.

### II. Conclusion

The Commission finds that the four public policies presented above are substantial public policy reasons that warrant the extension of all the legal and economic benefits discussed in Chapter 1 to same-gender couples willing to enter into the marriage contract, with all the responsibilities and burdens which that contract entails. The Commission notes that while the task at hand was to find substantial public policy reasons to extend part or all of the benefits identified, much of the discussion in this chapter focuses on the comparison of allowing state-certified marriage to same-gender couples versus denying it. This is a product of addressing the testimony and material presented to the Commission. The Commission has tried to incorporate and address as many of the ideas presented in the testimony as possible in its discussions of these policies.

The Commission finds substantial public policy with regard to equal protection arguments and rejects the the idea of nurturing procreation as a compelling state interest. The Commission also finds the *Loving* case to be similar to the issues surrounding the role of the Commission. The Commission, in determining whether there is substantial public policy that exists to extend all or part of the benefits identified in Chapter 1 of this report has reviewed a variety of positions and has concluded that substantial public policy reasons exist to extend not just part, but all benefits.

The primary reason for this is the deeply rooted belief of the people of Hawaii, America, and all humanity, in equality and equal rights of all people.

## Chapter 3

### APPROPRIATE ACTION WHICH MAY BE TAKEN BY THE LEGISLATURE TO EXTEND SUCH BENEFITS TO SAME-SEX COUPLES

The Commission's last task as assigned by Act 5, really had two steps. As stated the third task was to

**"(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."**

In Chapter 1, the Commission identified major legal and economic benefits that are extended to married couples that are not extended to same-gender couples. Then, in Chapter 2, the Commission discussed the arguments surrounding how they arrived at adopting four substantial public policies to extend those benefits. The adoption of those policies to extend all benefits to same-gender couples has bearing on this third task assigned to the Commission. Because the Commission has determined that substantial public policy exists to extend all benefits, the Commission had to reject any legislative option that does not provide that. A list of the options that were considered follows:

#### I. Options Considered

##### A. No Action

The Commission could recommend no action and keep the marriage law as it reads currently, allowing only a man and a woman to apply for a marriage license. This option is available only if no benefits are to be extended. Ironically, by taking this action, one testifier predicted that the Circuit Court may decide that the State has not shown a "compelling state interest" that is narrowly drawn and would order the State to issue marriage licenses to same-gender couples who apply and meet the requirements, therefore awarding all the benefits and responsibilities of full marriage.<sup>132</sup> On the other hand the Court could interpret a no-action recommendation by the Commission and by the legislature to mean the legislature believes the current law reflects the current public policy.

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132. See Minutes of October 25, 1995, for testimony of Thomas F. Coleman, Esq.

**B. Domestic Partnership**

**1. Limited Domestic Partnership that Extends Some Rights, Not All**

If the Commission recommended a domestic partnership law that included the extension of some benefits but not all, it would most likely be considered a law to be exercised within the limits of the State, and it is unlikely that it would be recognized in other jurisdictions not subject to State law. Benefits extended under this type of arrangement would most likely include benefits as a result of being a public employee and might include an extension of filing under a "married" status for same-sex couples under Hawaii's income-tax law.

**2. Comprehensive Domestic Partnership**

A comprehensive domestic partnership law would essentially extend all the possible<sup>133</sup> benefits and responsibilities of marriage to same-sex couples but through a different chapter in the law. The treatment of domestic partners would be similar to that of spouses under the marriage law. Domestic partners would be recognized as spouses throughout the *Hawaii Revised Statutes*. This comprehensive domestic partnership law, while not providing for real marriage, has been suggested to "moot" the *Baehr v. Miike*<sup>134</sup> case by providing all the incidents of marriage. In the words of the First Deputy Attorney General, "If it walks like a duck and talks like a duck, it's probably a duck."<sup>135</sup> The Commission disagrees. Under the *Baehr* decision case, adopting domestic partnership would not grant equal protection under the law.

**C. Separate Religious Marriage and Civil Marriage**

The option to separate religious marriage and civil marriage was suggested by two people who provided testimony to the Commission.<sup>136</sup> The concept is based on the constitutional provision of separation of church and state. The procedure to marry under the current law requires the State to issue a license and then to have the couple solemnize the relationship in a ceremony performed by an individual licensed to solemnize marriages.<sup>137</sup>

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133. The Commission can only recommend changes within the State's jurisdiction and, as a domestic partnership status is untested as to the extension of benefits in other jurisdictions, the Commission notes this limitation

134. See Note 122 for the explanation of the difference between the *Baehr v. Lewin* case and the *Baehr v. Miike* case.

135. See Minutes of October 11, 1995, for testimony of Steven Michaels, Esq.

136. See Minutes of October 11, 1995, for testimonies of Jori Watland and Penelope G. Spiller.

137. Section 572-11, *Hawaii Revised Statutes* (1993).

## APPROPRIATE ACTION WHICH MAY BE TAKEN BY THE LEGISLATURE

These individuals are members of religious organizations ordained or authorized to perform marriage ceremonies or they are judges, justices or magistrates.<sup>138</sup> While it is not uncommon to have a judge or justice marry a couple, it is more common to have the ceremony performed by a religious individual. This recognition by the State of a religious figure to authenticate the marital vows and entitlement to the benefits of marriage is peculiar from the perspective of the separation of church and state arguments. This somewhat contradictory structure is further confused by excluding the participation of the religious organizations if the marriage fails, leaving the dissolution strictly to the courts, much to the dismay of one testifier.<sup>139</sup>

This concept would provide a civil marriage that included the application of the license, and an oath or affirmation of the marriage vows by an authorized state individual who is completely separate from, and independent of, any religious ceremony that may be performed. The State would not need to license religious individuals to perform ceremonies, but they could perform any ceremony their religious beliefs recognize. There would be no need to have a religious ceremony if the couple did not desire. Likewise, the religious ceremony could be performed without state recognition, which is currently the case for same-sex couples. All the benefits and burdens of marriage under the law would be bestowed by the civil marriage. This option would extend all the benefits of marriage to same-sex couples and at the same time make optional the now-required step of a religious or judicial solemnization.

### **D. Allow Marriage**

Allowing marriage of same-sex couples would necessarily extend all the benefits currently enjoyed by opposite-sex couples. It would be the strongest statement with regard to those same-sex couples who present their married status in other jurisdictions.

### **E. Provide for Civil Registration or Something New**

This option is intended to consider providing for some type of new registration for everyone. This option would probably use a new chapter in the law to provide for some type of spousal registration. The requirements would be similar to the current marriage law but it would incorporate the separation issues as suggested in the option outlined in "C." above. Necessarily this type of legislation would also have to repeal the current marriage law. This option has the potential to create legal problems for the existing married couples in the State.

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138. Section 572-12, *Hawaii Revised Statutes* (1993).

139. See Minutes of October 11, 1995, for testimony of Reverend Jori Watland.

**F. Repeal Marriage**

The option to repeal marriage was presented to the Commission. Members of the public who testified before the Commission presented interesting ideas. One suggested that the marriage law is not perfect and needs to be fixed even for different-gender couples.<sup>140</sup> Another suggested that the only way to make everyone equal is to not give any benefits to anyone. If the marriage law is repealed, then no one would receive any benefits.

**G. Constitutional Amendment Allowing Marriage Between a Man and Woman Only**

A constitutional amendment to the State of Hawaii Constitution allowing marriage between a man and a woman only is an option that would effectively moot the case. The Supreme Court of Hawaii is the ultimate interpreter of the State Constitution, and an amendment specifically prohibiting marriage between people of the same-sex would make the *Baehr v. Lewin* opinion incorrect. This option would not extend any benefits to same-sex couples.

**H. Other**

**Redefine the Terms *Family* and *Immediate Family*.** The option to define the terms *family* and *immediate family* throughout the *Hawaii Revised Statutes* was proposed to the Commission. By redefining family to include individuals who maintain households and share the expenses and necessities of life, the Commission could pick and choose individual benefits to confer to same-gender couples. The legislation for this option could be very lengthy and cumbersome.

**II. Full Faith and Credit Issues**

The Commission heard testimony from several sources<sup>141</sup> concerning the full-faith and credit clause of the United States Constitution. The testimony suggests that because no state currently allows same-gender marriages, if the State of Hawaii were to allow them, a rash of litigation would spring up across the country from those couples who came to Hawaii to get married. The couples would return to their home states and expect to be recognized as

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140. See Minutes of October 11, 1995, pgs. 10 and 11 to 12, for testimonies of Sister Chatfield and Reverend Joris Watland.

141. See Minutes of October 11, 1995, pg. 6, for testimony of Steven Michaels, Esq., and Minutes of October 25, 1995, pg. T-14, for testimony of Jon Van Dyke, Esq. and pgs. T-31 to T-34 for testimony of Thomas F. Coleman, Esq.

## APPROPRIATE ACTION WHICH MAY BE TAKEN BY THE LEGISLATURE

married. Legal scholars generally agree it is not clear what will happen.<sup>142</sup> While the Commission is cognizant of this problem, the issue is beyond the scope of the assigned tasks.

### III. Residency Requirements

The Commission received testimony on the option of imposing a residency requirement. A residency requirement has been suggested as a method to avoid an influx of gay tourists, although like income taxes, a residency requirement is a double-edged sword. A residency requirement in the marriage law would be an effective tool to dramatically decrease the number of Hawaiian weddings by all visitors to Hawaii including the marriages of Japanese nationals. At the same time a residency requirement may encourage those who would not otherwise do so, to move to the State and establish residency. These arguments would also apply if a comprehensive domestic partnership law is used to extend benefits to same-gender couples. The Commission believes that imposing a residency requirement would not be beneficial to the State.

### IV. Conclusions

The Commission finds that married couples of the same gender are entitled to equal protection under the law and thus should be conferred governmental certification of their marriages. Therefore the Commission must reject all options stated above that do not confer full benefits.

It has been suggested that an appropriate action that might be taken by the Legislature in ending this gender discrimination is the passage of a domestic partnership bill. The Commission finds, however, that a *domestic partnership* is defined in a leading article on the topic as "two people living together in a committed, mutually inter-dependent relationship." Further, that laws governing domestic partnerships "apply uniformly to all couples," different-gender and same-gender, with a majority of the current government-certified domestic partners on the mainland United States being of different genders. Such couples are also sometimes referred to as "unmarried partners." The numbers of these unmarried partners have shown a significant increase over the last decade.<sup>143</sup>

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142. Compare the testimonies of Steven Michaels, Esq., Minutes of October 11, 1995; Jon Van Dyke, Esq.; and Thomas F. Coleman, Esq., Minutes of October 25, 1995. See also Appendix F.

143. Associated Press, "More career women choosing motherhood but not marriage," *Honolulu Advertiser*, November 8, 1995.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

The Commission finds that domestic partnership laws are designed for couples of whatever gender who do not want to get married, but who wish some legal form of protection and commitment that falls short of the protection and commitments inherent in marriage and government certification of marriage.

The Commission considered the options that would repeal benefits for everyone and rejected them as causing more problems than they solve. Therefore the Commission rejects the repeal of marriage.

The option to amend certain statutes to redefine family is rejected because it would have to amend each of the statutes in Appendix B. The Commission finds that approach to be complex, unwieldy, and unnecessary.

The option to create something new would effectively take a step towards the option of separation of the church and state in government certification of marriage, but both these options would cause more problems than they would solve. While the Commission finds this may eventually become a feasible, non-discriminatory way to address the issue, at this time it appears too unwieldy and complex.

The recommendation of the Commission is to extend all the benefits to same-gender couples by allowing them to marry. The Commission recognizes that certain religious groups fear that they will somehow be forced to celebrate the religious marriage ceremonies for couples that they disapprove of. The legislation recommended to the Legislature should include provisions to ensure that no religious group is compelled to celebrate marriage for any couple it disapproves of. The proposed bill, as contained in Appendix D, attached hereto, therefore contains such religious protection language.

The Commission additionally finds that with the recommended proposed bill, same-gender couples might fear that their certificates will somehow not be recognized by other jurisdictions. While no bill can be crafted that would guarantee recognition by other jurisdictions, legislation recommended to the Legislature includes provisions to safeguard that certificates awarded by the State will be recognized in other jurisdictions. The proposed bills, as contained in Appendix D, therefore contain such language.

The Commission acknowledges that approval of a bill allowing same-gender couples to marry may be politically difficult. This local political and sociological environment approximates the interracial marriage environment described in the *Loving* case thirty years ago on the mainland, where legalization of interracial marriage occurred by judicial order instead of by legislative action.

It has been suggested that a State comprehensive domestic partnership act be recommended in lieu of extending the marriage statute to same-gender couples. The

## APPROPRIATE ACTION WHICH MAY BE TAKEN BY THE LEGISLATURE

Commission disagrees. Under the *Baehr* decision case, adopting domestic partnership would not grant equal protection under the law. Although the Commission recognizes that domestic partnership would create a separate-but-"equal" solution, at least the extension of many marriage benefits would reach more couples. A sample bill along these lines is contained in Appendix D.

State-recognized domestic partnership would create a new status in addition to marriage, and the results of such an act are uncertain. Two items are reasonably certain. First, it would have to be open to different-gender couples. Second, it might encourage same-gender couples to move permanently to Hawaii as the benefits of the comprehensive domestic partnership may not be transferable to their home states.

The Commission has found that couples of the same gender are marrying today, and that these marriages are entitled to equal protection under the law and should be granted all the benefits and should take on the obligations conferred by governmental certification of marriages.

## Chapter 4

### FINDINGS AND RECOMMENDATIONS

#### I. Findings

1. The Commission finds that the conferring of a marriage certificate can bestow benefits in other jurisdictions. While those may be beyond the scope of this Commission, the ability of the State to extend those benefits by providing a marriage certificate to individuals is significant.

2. The Commission finds that major legal and economic benefits conferred by the marriage certificate through the *Hawaii Revised Statutes* include intangible, substantial-quantifiable, and general benefits.

3. The Commission finds there are substantial public policy reasons to extend the those benefits in total to same-sex couples. Those public policy reasons include:

- a. Article I, sections 2, 3, and 5 of the Constitution of the State of Hawaii clearly states that all persons in Hawaii are entitled to equal protection under the law, including the right to enjoy their inherent and inalienable rights to life, liberty and pursuit of happiness, and be free from illegal discrimination or the denial of basic rights on the basis of gender.

The Commission finds that the denial of the benefits of marriage to same-gender couples, purely on the basis of their gender, is a violation of those constitutional rights.

In the case which gave rise to the establishment of this Commission, *Baehr v. Miroski*, 74 Haw. 530 (1993), the Supreme Court of Hawaii recognized the relevance of the United States Supreme Court's 1967 decision to strike down a Virginia statute which prohibited miscegenation, or interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967). The Hawaii Supreme Court found that denial of same-gender marriage was presumed to be a violation of equal protection of the law unless the State could show a "compelling state interest" for such denial. The Commission finds that the various reasons advanced for denying same-gender marriages, including religious, moral and public health and safety, are similar to the *Loving* case and do not constitute a "compelling state interest" and, as a matter of public policy, should not be used to deny equal rights under the law to same-gender couples.

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

- c. The argument that same-sex marriage should be barred because it cannot lead to procreation is invalid, inconsistent, and discriminatory. Public policy should not deny same-sex couples the right to marriage and the right to raise a family if they wish to do so, on the excuse that they, between themselves, cannot procreate, when this reason is not applied to opposite-gender couples. State law does not require that opposite-sex couples prove that they are capable of procreation before they can be married, and many are obviously not, because of age, medical or other reasons. Individuals in a same-gender marriage may have children from a prior opposite-gender marriage, or can adopt children if they desire a family.
- d. Under our constitutional government the fact that some religions or churches condemn same-gender marriages does not mean that those religious beliefs can be imposed on others. Our separation of church and state prevents religious enforcement through state institutions, such as the Department of Health. Furthermore, the Constitution prohibits any religious group from having to perform the marriage of a couple that is not recognized by that religion.

4. The Commission finds that, based on the major legal and economic benefits and the substantial public policy, the only logical conclusion is to recommend that same-gender couples be allowed to marry under chapter 572, *Hawaii Revised Statutes*. The Commission also acknowledges that the extension of marriage to same-gender couples may not be a legislative alternative at this time.

5. In the event that same-gender marriage under chapter 572, *Hawaii Revised Statutes*, is not a legislative alternative, the Commission recommends a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people regardless of gender.

## II. Recommendations

Based on the findings stated above, the Commission first recommends the Legislature amend chapter 572 to allow two people to marry, regardless of their gender. The Commission also recommends the Legislature adopt a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people, regardless of gender.

## Chapter 5

### MINORITY OPINION

The irony of this "minority" opinion is that its conclusions actually reflect the view of a majority of Hawaii's residents.<sup>144</sup> According to the most recent poll taken by SMS Research, *The Honolulu Advertiser* and KHON July 19-29, 1994, more than two-thirds<sup>145</sup> of the respondents stated that Hawaii should not allow people of the same sex to marry. The public response to the Draft Final Report of this Commission confirms this as well. Of 1033 written comments received, 455 were in favor and 578 were opposed to homosexual marriage.<sup>146</sup> At the December 6, 1995, meeting, where public comment was received, of 103 who testified, 22 were in favor and 81<sup>147</sup> were opposed to homosexual marriage. In addition, the Legislative Reference Bureau (LRB) received so many telephone calls concerning the Draft Report that they could not record the messages because it would interfere too much in their ability to do their other work.

Opposition to changing the definition of marriage is also consistent with the policy in Hawaii prohibiting "common law marriage". The State of Hawaii has protected traditional marriage and has narrowly circumscribed marriage rights since 1920.

So zealously has this court guarded the state's role as the exclusive progenitor of the marital partnership that it declared, over seventy years ago, that 'common law marriages'--i.e., 'marital' unions existing in the absence of a state-issued license and not performed by a person or society possessing governmental authority to solemnize marriages--would no longer be recognized in the Territory of Hawaii.<sup>148</sup>

The irony of the Majority Response to Minority Opinion, is that the majority's rebuttal to the minority opinion validates the content of the minority opinion. In the Response, the majority excuses its conduct on its understanding that it had to address its efforts "with speed and decisiveness if it was to complete its work within the limited time allowed."<sup>149</sup> That force

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144. See "Five Hawaii Polls On Legalizing Same-Sex Marriages" attached as Appendix G.

145. *Id.*

146. These numbers represent comments from individuals and do not include the approximately 2000 signatures submitted in petitions opposing same-sex marriage from thirty different groups.

147. Several written testimonies, not presented orally, were received at the December 6, 1995, meeting. In addition, one of the members of the public who did testify presented 800 signatures on a petition opposed to homosexual marital rights.

148. *Baehr v. Lewin*, 74 Haw. 530, 559 (1993) quoting *Parke v. Parke*, 25 Haw. 397, 404-05 (1920).

149. See Section II.F. of Chapter 6 of this report.

and a disinterest in opinions opposed to homosexual marital rights drove what the minority describes as a railroad job in this minority opinion.

## I. Introduction

### A. Reason For Minority Opinion

Due to the five-member majority of Commission members who vigorously support homosexual rights, the debate needed for serious analysis did not occur. The Governor's Commission on Sexual Orientation and the Law failed in its effort to seriously analyze the issues presented. See letters to Chairman Gill dated October 10, 1995, from Commissioner Hochberg and October 11, 1995, from Commissioner Sheldon attached hereto as Appendix H.

This opinion of a minority of the Governor's Commission on Sexual Orientation and the Law is written because the two-member minority disagreed with the substance of the majority's analysis and because the process employed by the majority to reach their conclusions is faulty. Instead of looking to Act 5, 1995 Session Laws, for guidance, the majority of the Commission saw its role as validating favorable portions of the court opinion in *Baehr v. Lewin*,<sup>150</sup> even though in Act 217, 1994 Session Laws, the legislature roundly criticized the court opinion in *Baehr*. As a result, during the actual Commission meetings, the majority of Commissioners refused to examine the major legal and economic benefits reserved for married couples, but instead simply reached their conclusions. In addition, the majority refused to examine substantial public policy reasons not to extend these benefits in part or in whole to homosexual couples.<sup>151</sup> The overwhelming credible evidence available to the Commission requires that the State of Hawaii not recognize homosexual unions as equivalent to traditional, heterosexual marriage.

### B. Recommendations

The minority of the Commission recommends that no action be taken to extend any legal or economic marital benefits to homosexual couples that they do not already enjoy. In addition, the minority finds that the majority's recommendation that the legislature embrace same-sex marriage will severely, negatively affect the Attorney General's ability to prevail in the pending *Baehr v. Miike* litigation. In light of this, the minority also strongly recommends that the legislature undertake to amend the Constitution of the State of Hawaii to reserve marriage and marital rights to unions between one man and one woman. If any marital rights are granted to homosexual couples, the minority vigorously recommends that the legislation

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150. See Preface to this report at item IA.

151. Laboring under the misapprehension that any opposition to homosexual marital rights is simply wrong, the majority rejects outright all opposition to homosexual marital rights without seeking to understand the reason for that judgment.

## MINORITY OPINION

contain a sweeping religious exemption. Finally, the minority recommends that the legislature consider reviewing Hawaii laws to determine whether it should enlarge the definition of "family" in some statutes in order to protect legitimate "family" needs for unmarried people. In evaluating which, if any, statutes should be changed in this regard, the minority also strongly recommends that the legislature evaluate the cost to the state from such change.

### C. Summary

This report presents information received from persons who testified before the Commission as well as material included in the Commission's bibliography. This modern literature concerns legal, economic and social policy analysis of marriage and marital rights, family and child rearing, the attributes of homosexuality and the effects of homosexuality on the community. Many people testified that they were opposed to homosexual marital rights on economic, religious, historical, medical and psychological grounds. Of critical importance to many people who testified was the protection of children. The majority report simply rejects all these bases of opposition to homosexual marital rights. The majority's argument relies on the tenuous assumption that the present legal status of gay marriages parallels the laws against interracial marriages in the 1960s. The minority opinion addresses some of the reasons why this is a false assumption. Race and gender are immutable characteristics. Clearly, sexual orientation is not in the same category--sexual orientation is known to change and is, to a large extent, behavioral. The argument that homosexuality is genetically determined and so in the same category as race or gender has not valid scientific support. There are many elements of behavior, such as the propensity to violence for which a genetic determinant has been found. This does not mean that such a behavior should be elevated to the status of the most favored in the State. Homosexual marital rights are simply not civil rights. As discussed in more detail below, homosexuality is not immutable but is caused by disturbed family environment and interaction between the parents and their children.

Regardless of any person's philosophy that homosexuality is either deviant or an acceptable alternative lifestyle, the issue of homosexual marital rights must be resolved on the basis of what is good for society. While the majority were not interested in discussion of reasons not to extend the benefits of marriage to homosexual couples, this minority opinion identifies the following major reasons why there should not be a drastic revision of the marriage law.

- The minority refutes the assumption that legalizing same-sex marriage will be of any benefit at all to Hawaii's economy. On the contrary, it is more likely that Hawaii's major industry, tourism, will be negatively affected, as the image of Hawaii deteriorates from the aloha state to the gay honeymoon and wedding destination of the world.
- The minority is seriously concerned about the adverse effect legalizing homosexual marriage will have on the social, sexual and psychological

development of children. The majority did manage to find some "expert" to testify that being raised in a homosexual household had no detrimental effects on children, but the vast body of work done on the issue suggests the opposite.

- The minority believes that the ramifications on the education system would be far-reaching, touching all elements of the curriculum. Parents are protective and concerned about their children's education, as demonstrated by the outrage caused by the misguided Project 10 on the Big Island. The rights of parents must be favored over the rights of the homosexual community.

Every person's review of this report should focus on resolving the issue of homosexual marital rights in such a manner as to protect and preserve society, both in Hawaii and the United States. Clearly, this issue will affect everyone in the State. It will affect the entire country, since other states will be forced to deal with whether their states must accept any homosexual marital rights granted on a statewide basis in Hawaii. There is even a home page on the Internet where homosexual activists freely discuss this issue across the country.

The majority supports its position by arguing that withholding marital rights constitutes discrimination against homosexuals. However, even the Hawaii Supreme Court in *Baehr* held that there is no fundamental right to homosexual marriage:

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise. (Emphasis added.)<sup>152</sup>

Therefore, the resolution of this issue cannot be analyzed solely on the basis of the value of autonomous freedom for homosexuals, or an assumption of improper discrimination. Permissible discrimination occurs in many ways on a daily basis.

Not all forms of discrimination are inappropriate, and one should not jump to the conclusion that opposition to endorsing homosexuality constitutes inappropriate discrimination.<sup>153</sup> Discrimination (approval or disapproval of a person or group) based on judgments in the absence of evidence is inappropriate. However, certain distinctions can reflect prudent judgment based on evidence.<sup>154</sup> Therefore, the Commission should have first

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152. *Baehr*, 74 Haw. at 556, 557.

153. See Minutes of October 11, 1995, pgs. T-8 to T-13, for testimony of Dallas Willard, Ph.D.

154. Dinesh D'Souza, "Prudent Discrimination, Myth of the Racist Cabbie," *National Review*, October 9, 1995 pg. 36.

## MINORITY OPINION

examined the evidence of the attributes of homosexuality and the effects those attributes have on children, family and society. Although the majority of the Commission did not even consider such information important, only with that information can one take a rational position regarding the extent to which the State of Hawaii should endorse--and by its endorsement encourage--homosexual practices. The majority's recommendations actually constitute prejudiced discrimination against those whose prudent judgment, based on the evidence, does not equate homosexuality and heterosexuality.

### II. Act 5, Session Laws of Hawaii 1995: The Legislative Charge

The Legislature charged this Commission to "examine the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples; to examine the substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples; and to recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."<sup>155</sup> Act 5 repealed part of Act 217 from the 1994 legislature, and redefined the Commission's instructions. However, Act 5 did not repeal that portion of Act 217 which contained the Legislature's vigorous chastisement of the Hawaii Supreme Court's opinion in *Baehr v. Lewin*. Nonetheless, the majority of the Commissioners ignored the legislative intent contained in Acts 217 and 5, and instead addressed its analysis to validating parts of *Baehr v. Lewin* to scuttle the Attorney General's defense of the marriage laws in the *Baehr v. Miike* case pending before the court. Substantially all of the public policy discussion at the Commission dealt with invalidating the defense of the litigation, and very little of the Commission's efforts addressed any public policy reasons not to extend benefits to homosexual couples.<sup>156</sup>

The minority members of this Commission understood the legislative charge to be to examine the institution of marriage and family, including the major legal and economic benefits, and recommend to the legislature whether or not it is appropriate, based on substantial public policy reasons, to change the long-standing, zealously guarded definition of the marital partnership by opening that partnership to same-sex couples in whole or in part.

The minority members of this Commission understand that because there are good reasons to support the heterosexual norm, due to the fact that it has been developed with great difficulty and can be maintained only if it is cared for and supported, we cannot be indifferent to attacks upon it.

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155. Act 5, Session Laws of Hawaii 1995 (see Appendix A).

156. See Minutes of October 11, 1995 and Minutes of November 8, 1995.

Marriage and the family are institutions necessary for our continued social well-being and, in an individualistic society that tends to liberation from all constraint, they are fragile institutions in need of careful and continuing support.<sup>157</sup>

The Commission, controlled by the five-member majority, did not undertake an unbiased academic approach to its charge, due to the majority's pro-homosexual bias and the time constraints placed on the Commission work. In the majority Response to this report, at II.F., the need for "speed and decisiveness" is the euphemism employed. The authors of this minority opinion hope that the legislators read this report for the factual content. It is not presented as an advocacy tool, but as a work of scholarship to assist the legislature with the very difficult, but historically critical task with which *Baehr v. Lewin* saddled the legislature.

**III. The Majority of the Commission Refused to Follow Legislative Instructions to Examine Major Legal and Economic Benefits Extended to Married Opposite-sex Couples, But Not to Same-sex Couples**

**A. The Majority of the Commission Adopted Without Review the Work Product of the 1994 Commission Which Examined Precise Legal and Economic Benefits Defined as "Anything Contributing to an Improvement in Condition or an Advantage," Notwithstanding the Change in Legislative Charge to Examine Major Legal and Economic Benefits**

In the first Commission meeting, we discussed the fact that the Legislature modified the charge to the Commission in Act 5 from what had been charged in Act 217.<sup>158</sup> That change concerned the replacing of the instruction to examine "precise" legal and economic benefits in Act 217, with "major" legal and economic benefits in Act 5. The legislation does not reveal the reason for that change, nor the change from examining only public policy reasons to extend benefits in Act 217 to examining public policy reasons to extend or not to extend benefits in Act 5. Clearly, however, the implication of the two changes indicates legislative intent to make the inquiry more helpful to the legislature by narrowing the scope of benefits examined and increasing the scope of public policy examined.

The charge in Act 217 to examine precise legal and economic benefits had resulted in the 1994 Commission adopting a working definition of legal benefit as "anything contributing to an improvement in condition or an advantage that a married couple would have as a result of holding the status 'spouse' or 'family' that would not be offered to a same-gender couple even though they had the same commitments to each other as a married couple or family."<sup>159</sup>

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157. The Ramsey Colloquium, "The Homosexual Movement, A Response by the Ramsey Colloquium," *First Things*, March 1994.

158. See Minutes of September 13, 1995.

159. *Interim Report from the Commission on Sexual Orientation and the Law*, January 17, 1995.

## MINORITY OPINION

Such a definition identifies precise benefits, as called for in Act 217. However, such a definition does not identify "major" benefits as charged in Act 5.

For most of the life of the 1995 Commission, the majority continued to use the definition from the 1994 Commission, notwithstanding requests at every meeting to adopt a definition of "major legal and economic benefit" which would give the Commissioners a common benchmark for evaluating marital benefits in light of the changed legislative instruction. The proposed definition, rejected at each meeting, sought to direct the Commission to "significant" legal and economic benefits, weighed against any burdens attached to the benefits, and then defined as major benefits only if these significant benefits were not available to same-sex couples via another avenue or means. Such a definition seemed to address what the legislature meant by "major legal and economic benefits." The majority claims in Chapter 1, Section C.1. of their report that they rejected this definition because it effectively defined no benefits. However, the majority never exercised their five votes in any full Commission meeting to apply the definition to any statute. Clearly, their five votes could have approved the same list of benefits using this rejected definition. The difference is that they would have laid bare their rationale on a statute by statute basis.

The majority of the Commission not only rejected this definition at each meeting, and continued to refuse to adopt any other definition of "major legal and economic benefits," but the majority continued to accept the work product of the Legislative Reference Bureau (LRB) staff attorney based upon the legislative directive under Act 217, 1994. In addition, although much of the Commission's research work was completed between September 13 and October 25, 1995, it was not until October 26, 1995, that the majority discussed and adopted a definition of "major" legal and economic benefit. On October 26, 1995, the majority adopted a definition which utterly failed to focus on "major" benefits. Instead, the majority maintained that every benefit, no matter how slight, when combined together with all the other benefits, no matter how slight, constituted together major legal and economic benefits. This clearly did not address the legislative charge in Act 5.

### **B. The Majority of the Commission Finally Abandoned Pretense In Late October And Defined Major Legal And Economic Benefit Based On The *Baehr v. Lewin* Supreme Court Opinion Addressing Salient Marital Rights**

On October 26, 1995, when most of the permitted research work of the Commission had been completed, the majority of the Commission abandoned pretense and fashioned a definition of major legal and economic benefits based upon the Hawaii Supreme Court's 1993 reference to "salient" marital rights in the *Baehr v. Lewin* decision. The Supreme Court was listing benefits which stood out to them without undertaking exhaustive research and without assigning "major" or "minor" value them. For example, the Supreme Court recognized as a salient marital right, among other things, the right to change of name by changing ones name on the marriage license. Clearly, the legislature in seeking analysis of major benefits, did not adopt the *Baehr* opinion definition of "salient" rights. In fact, the legislature strongly criticized

## REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

the opinion in great detail in 1994. Therefore, instead of examining the major benefits as charged by the legislature, the majority marched lock-step with the plaintiffs in the *Baehr* case and present to the legislature a report which points to every single legal and economic benefit listed in a nineteen-page catalogue of laws containing the words marriage, husband, wife, spouse, or family.

In fact, the definition fashioned by the Commission includes as "major" legal and economic benefits the following, among others:

1. HRS section 183D-22, which affords resident fees for hunting licenses to a spouse of an active duty military person stationed in Hawaii; obviously, the burden imposed on a homosexual member of the military when identifying his "spouse" for hunting license purposes, is not worth the value of the difference between the resident and non-resident hunting license fee.
2. HRS section 157-32, which requires the Milk Board to consider the cost of the producers' family labor when determining minimum prices for milk.
3. HRS section 188-34, which permits certain fishing in Hilo Bay to feed one's family but not otherwise; although "family" is not defined in the statute, the majority assumes that such fishing would be prohibited if the family was unmarried.
4. HRS section 188-45, which permits statewide fishing for Nehu and `Iao to feed one's family but not otherwise; although "family" is not defined in the statute, the majority assumes that such fishing would be prohibited if the family was unmarried.
5. HRS section 200-39, which allows transfer of permits for commercial ocean activity in Kaneohe Bay to be made between family members. However, according to Steve Thompson of the Vessel Registration Section of the Boating and Recreation Division, the law only applies to five or fewer of companies, and to his knowledge of those, only one transfer has taken place (and not to a family member anyway).
6. HRS section 338-14, which provides the immediate family of a veteran free copies of certificates and other records.
7. HRS Chapter 510, which deals with community property rights. Chapter 510 was enacted in 1945 but repealed in its entirety in Hawaii in 1949. Although interests which had vested during the four years Hawaii permitted community property were not divested by repeal, it is clear that since no homosexual couple can possibly have any vested rights under Chapter 510, the legislature

## MINORITY OPINION

would look rather foolish if it purported to include homosexual couples within the purview of Chapter 510.

8. HRS Chapter 533, sections 1-16, which deal with dower rights; dower rights were abolished in Hawaii in 1977. Although dower rights vested at that time were not effected, it is not likely that there is any current benefit whatsoever from HRS sections 533-1 through 16. Again, it would detract from the legislature's credibility to extend to same-sex couples rights which were, many years ago, repealed with respect to heterosexual couples.

Due to the definition employed by the majority of the Commission, there were scores of other examples of legal and economic benefits erroneously defined as "major" legal and economic benefits. The majority's reliance on the *Baehr* opinion's recitation of salient rights to define the legislature's charge to examine major legal and economic benefits defies rules of construction of legislative intent. Clearly, the court's opinion was available to the legislature in 1994 when it was so roundly criticized in the preamble to H.B. No. 2312, which became Act 217. However, the legislature did not refer to the opinion in Act 5, nor reference the court's list of salient marital rights. The legislature's ignoring of the court's use of salient rights indicates that the legislature did not intend the Commission to use salient to define major. The definitions of the two words themselves further support that position.

### **C. The Majority of the Commission Failed to Analyze or Discuss in Any Detail the Nineteen-Page List of Hawaii Revised Statutes Sections Purportedly Extending Major Legal and Economic Benefits to Married Couples**

Although a long list of statutes is appended to the majority report to catalogue an exhaustive list of major legal and economic marital benefits (hereinafter referred to as the "Nineteen-Page List"),<sup>160</sup> an initial fifteen-page list was developed by the LRB staff Attorney using the 1994 Commission definition of precise legal and economic benefits (hereinafter referred to as the "LRB List"). Not only was the LRB List not based upon a search for major benefits, but the Commission never examined the list of statutes. The Nineteen-Page List was not even presented to the Commission until November 22, 1995.

An actual review of these statutes revealed that at least 205 of these statutes should not be listed as extending major legal or economic benefits to married opposite-sex couples, but not to same-sex couples for several reasons. These reasons include: (1) the statutes do not extend any benefit whatsoever; (2) the benefit extended is not a "marriage" benefit, but a "family" benefit; (3) the benefit is not a spouse or marriage benefit, but a benefit relating to biological parenthood; (4) the benefit, although a marriage benefits, is too small to be considered a major legal or economic benefit; (5) the statute actually extends a marriage

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160. See Appendix B.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

burden, not benefit; (6) the benefit extended by the statute is not withheld from same-sex people; (7) although a marriage benefit is extended to the spouse of a service person, when a same-sex couple seeks the benefit, the burden on the same-sex couple far outweighs the benefit; and (8) the basis for finding that the benefit is not extended to same-sex couples is based on the majority's very restrictive definition of "family" which is not contained in the legislation. For instance:

- (1) The following Hawaii Revised Statutes sections, included in the list do not extend any benefit whatsoever: 11-13, 11-191, 46-4, 53-5, 53-7, 53-56, 87-25, 88-4, 111-2, 145-1, 146-21, 147-71, 226-4, 226-19, 261-31, 261-34, 321-23, 329-1, 346-10, 346-82, 351-2, 398-1, 412:10-100, 431:10A-103, 431:10D-104, 431N-1, 510-5, 510-6, 510-9, 519-10, 510-22, 510-23, 510-24, 510-25, 533-1, 533-2, 533-3, 533-4, 533-5, 533-6, 533-7, 533-8, 533-9, 533-10, 533-11, 533-12, 533-13, 533-14, 533-15, 533-16, 533A-1, 554-6, 554B-1, 560:2-202, 560:2-203, 560:2-204, 560:2-205, 650:3-703, 560:6-107, 572D-10, 651-91, 651C-1, 706-673, 801D-2.
- (2) The following Hawaii Revised Statutes sections, included in the list, do not extend a "marriage" benefit, but extend a "family" benefit: 11-204, 79-13, 105-2(6), 226-5, 235-55.7, 324-22, 338-14, 398-3, 706-670.5, 801D-4.
- (3) The following Hawaii Revised Statutes sections, included in the list, extend a benefit based upon biological parenthood, but not a spouse or marriage benefit: 235-7.5, 338-21, 431:10A-116.5, 431:1-601, 584-6, 321-321, 321-322, 346-17.4, 346-37.1, 350C-1, 350C-2, 350C-3, 350C-4, 350C-5, 350C-6, 350C-7, 352-29.
- (4) The following Hawaii Revised Statutes sections, included in the list, extend such a small marriage benefit that it cannot be considered a major legal or economic benefit: 200-39, 334-10, 574-5(3).
- (5) The following Hawaii Revised Statutes sections, included in the list, actually extend marriage burdens, not benefits: 88-4, 171-74, 201E-141, 207-2, 235-4, 235-5.5, 425-125, 443B-1, 551-2, 558-6, 560:2-508, 560:2-803, 572D-3, 334-6.
- (6) The following Hawaii Revised Statutes sections, included in the list, extend benefits which are not withheld from same-sex people: 26-14, 28-101, 46-6, 53-6, 79-7, 111-4b, 111-7, 111-4, 171-84, 201E-1, 201E-62, 201E-130, 201E-131, 201E-145, 201E-200, 206E-10.5, 209-8, 226-3, 226-22, 226-25, 231-57, 235-54, 261-33, 301-2, 321-331, 334-60.5, 334-125, 334-134, 338-18, 346-71, 346-261, 346-262, 346-263, 346-264, 346-265, 346-266, 346-267, 346-268, 346-269, 346-270, 346-271, 346-272, 431:10A-103, 431:10A-115, 431:10A-202, 431:10D-114, 516-71, 560:5-410, 560:5-601, 571-46, 572-21, 572-22, 572-23, 572D-1, 574-1, 586-1, 663-3, 707-700, 709-906.

## MINORITY OPINION

- (7) The following Hawaii Revised Statutes sections, included in the list, extend a marriage benefit to the spouse of a person currently serving in the armed forces, and consequently, when a same-sex couple seeks the benefit, the burden on the same-sex couple far outweighs the small benefit: 183D-22, 231-15.8, 261-32, 286-107(g), 606-5.
- (8) Finally, the following Hawaii Revised Statutes sections are included in the list as marriage benefits refused to same-sex couples, based on the majority's very restrictive definition of "family" which is not contained in the legislation: 11-14.5, 46-15.3, 150A-5(2)(A), 157-32, 231-25, 40-85(c), 188-34, 188-45, 201F-3, 209-29, 231-25, 237-24.3(10), 281-3, 306-1, 321-123, 321-351, 334-59, 335-1, 346-14, 346-53, 346-65, 352-13, 352-22, 352-26, 352D-1, 352D-2, 352D-3, 352D-4, 352D-5, 352D-6, 352D-7, 352D-8, 352D-9, 352D-10.

The minority Commissioners examined the Nineteen-Page List during the two weeks between November 22, 1995, when it was received from the majority, and December 6, 1995, the date the final draft of the minority opinion was due. A more detailed review should be made before any of the benefits are extended to homosexual couples. It must be noted that the Commission itself never examined the statutes to determine whether either list was correct and the statutes actually extended the benefits indicated on the lists. In addition, neither list was analyzed to determine whether any benefits extended were major benefits. Consequently, the Nineteen-Page List contains all these statute references whether or not the statutes in fact extend major legal and economic benefits.

### **D. Most of the Statutes in the Nineteen-Page List Do Not Extend Major Legal or Economic Benefits to Married Couples**

Two economists testified before the Commission: Sumner La Croix, Ph.D. and Moheb Ghali, Ph.D.<sup>161</sup> Accordingly, to Dr. Ghali, all economists agree that to determine the economic value of any particular benefit, one must first determine the "Expected Value" and then discount that value by the probability of someone taking advantage of the benefit under consideration.<sup>162</sup> For instance, where a benefit derives from status as a professor at the University of Hawaii, then the likelihood of someone taking advantage of that benefit is equal

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161. Emeritus Professor of Economics, University of Hawaii. He is currently the Vice Provost for Research, Dean of the Graduate School, and Professor of Economics, Western Washington University. Author of, among other things: *Tourism and Regional Growth, Studies in Applied Regional Science*, Vol. 11, Martinus Nijhoff Social Sciences Division, Leiden, 1977; *The Structure and Dynamic Properties of a Regional Economy*, Lexington Books, D.C. Heath and Company, Lexington, Toronto, London, 1975.

162. See Minutes of October 11, 1995 for Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners," attached in Appendix I.

to the ratio of the number of U.H. professors to the population at large. In addition, future benefits should be reduced to present value to determine the value of the benefit.

Most of the benefits addressed by Dr. La Croix as expected economic benefits concern estate planning techniques available to married people by virtue of their status as husband and wife. However, all of those benefits, with the exception of the marital deduction and marital elective share, are available to non-married people from the use of inexpensive simple will forms available for a few dollars in stationery stores.<sup>163</sup> In addition, the marital deduction benefits are federal law, not likely affected by state law changes. Likewise, the elective share benefits are only relevant where a spouse has been disinherited, and disinheritance is easy to accomplish in ways that avoid elective share rights.

The majority report attributes several thousand dollars of value to estate planning techniques for "replicating marital benefits" based upon the attorney fees to have the documents drawn rather than the value of using the stationary store estate planning forms. Interestingly, the majority refused to identify the three attorneys consulted for the valuation, notwithstanding that the names were twice requested by the minority Commission members who desired to discuss the matter. Whatever the expense of the inexpensive simple will form, it is certainly not the value attributed by the secret attorneys relied on by the majority of the Commission.

Furthermore, where it is worthwhile to spend money on estate planning, it is no more expensive for unmarried couples than for married couples. In addition, trusts, durable powers of attorney and living wills are the remedies available to all unmarried people without regard to their sexual orientation. In Dr. Ghali's opinion, the value of these small benefits is saving the minimal cost of these widely used remedial measures. He opined that the data or measurement of this small value is not warranted in light of the cost to do the research.

Dr. La Croix erroneously found the ERS system to provide major retirement benefits for married, but not unmarried persons. However, to the contrary, the ERS system permits every member to designate anyone as the beneficiary--a spouse, domestic partner or anyone else--and thus there are not additional benefits to be realized in the ERS pension plan.

Dr. Ghali concluded that only very few of the legal or economic benefits contained in the LRB List address the Legislature's instruction to the Commission to "examine major legal and economic benefits." In fact, of the benefits listed in the LRB List, Dr. La Croix identified only nine "[b]enefits from Marriage with a Significant Expected Value."<sup>164</sup> Of those, Dr. Ghali testified that:

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163. *Id.*

164. See Minutes of the October 5, 1995, for testimony of Sumner La Croix, Ph.D., attached in Appendix I on pg. 244 of this report.

## MINORITY OPINION

Because many of the benefits listed by Professor La Croix under his heading have very small probabilities of being used, as he correctly points out, the expected value of each benefit is small, and the sum of the discounted expected values of this group of benefits is likely to be small. While it is possible to collect data to measure the discounted expected values of these benefits, I do not believe the magnitude of the benefits is sufficient to justify the cost of the data acquisition.<sup>165</sup>

### **E. There are Apparently Three or Four Benefits Addressed By Dr. La Croix Which Merit Investing the Resources to Research the Value**

Dr. Ghali agrees that three or four benefits addressed by Dr. La Croix merit investing the resources to research the value. Those benefits are: Retirement Health Insurance Benefits, Non-Retirement Health Insurance, ERS Death Benefits, and Hawaiian Home Lands Leases. According to Dr. Ghali, none of the other benefits can possibly be large enough to bear the cost of the analysis needed to determine the value, and therefore cannot constitute major legal or economic benefits.<sup>166</sup>

Concerning the retirement health insurance benefits, most unmarried people in Hawaii have health care. Employers must provide coverage to employees. Many unemployed also receive free health insurance. Assuming that the homosexual and common law marriage community are retired, unmarried and uninsured, Dr. Ghali suggests that data be collected and analyzed to determine the economic value of the benefit. The data needed should concern the average annual cost of spousal retirement medical coverage (the remedy) and the estimate of the number of people expected to benefit (the class to receive the new benefit). This information will reveal the estimated fiscal impact on the ERS and the Health Fund, and whether a general increase in employee contributions or in State tax revenues will be required to cover the additional cost.

Concerning the non-retirement health insurance benefits, Dr. Ghali suggests that data be collected and analyzed concerning the average annual cost of spousal medical coverage and the estimate of the number of people expected to benefit from non retirement health insurance. This information will reveal the magnitude of the subsidy. In addition, alternative ways of funding the health insurance coverage must be analyzed.

Concerning the ERS Death Benefits, Mr. Shimabukuro, of the ERS, testified that the benefits payable upon the death in-service of an employee are only available to the surviving

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165. See Minutes of October 11, 1995, for Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners," attached in Appendix I, on pg. 270 of this report.

166. See Minutes of October 11, 1995, for Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners," attached in Appendix I, on pg. 270 of this report.

spouse (until remarriage) and the dependent children (until attainment of majority) if the employee was under the non-contributory plan. The only benefit exclusive to spouses under the contributory plan is an additional pension. However, the contributory plan has been closed to new members since the mid-1980's. As Dr. Ghali explained how to measure the economic value of these benefits:

Data on the number of cases of in-service death as a percent of the total active membership over the past five years would give a reasonable estimate of the probability of the death benefits. The average payment per case of in-service death over the past five years would be a reasonable estimate of the benefit value. Both of these data should be easily available from ERS. The benefit value multiplied by the probability would yield the expected value of the death benefits. This figure, the expected value of death benefits to survivors of non-contributory members is needed to measure both the potential benefits and costs of any policy change. Similarly, the expected value of the exclusive spouse pension under the contributory plan can be calculated to evaluate the potential benefit and cost of the policy change.<sup>167</sup>

Concerning the Hawaiian Home Lands Lease issue, Dr. Ghali opines that to determine whether to extend this benefit to Non-Hawaiians, the cost of extending this benefit must be evaluated in light of the shortage of Hawaiian Home sites. To the extent that the Hawaiian family on the waiting list pays a rent higher than the Hawaiian Homes lease rent, there is an inefficiency in the allocation of resources. He states that data on the excess demand for Hawaiian Home Lands parcels must be analyzed. Dr. Ghali suggested that:

To evaluate this potential benefit, one needs to know the frequency of unmarried people that occupy Hawaiian Homes Lands properties at this time. An opinion survey of Hawaiian community attitude towards granting the rights to unmarried partners of Hawaiians in preference to their Hawaiian families would be helpful, as it will ultimately be the Hawaiian Home Lands that will make the decision regarding the extension of this benefit to domestic partners.<sup>168</sup>

Dr. La Croix and Professor Roth both discussed federal tax benefits from marriage. Both testified that the tax code benefits and burdens married and unmarried couples depending on the taxable income rather than the marital status. Both also agreed that neither this Commission nor the state legislature can modify the U.S. Internal Revenue Code. Therefore, it is not certain that federal tax economic benefits will be gained extending marital rights to unmarried people. Were people to actually marry, whether they benefit or are burdened depends on their relative incomes. Unless data show that most or all same-sex

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167. See Minutes of October 11, 1995, for Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners," attached in Appendix I on pg. 272 of this report.

168. See Minutes of October 11, 1995 for Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners," attached in Appendix I, on pg. 273 of this report.

## MINORITY OPINION

couples have greatly unequal income, Dr. Ghali, Professor Roth and Dr. La Croix agree that there is no reason to assume a general tax benefit from marriage.

### **F. Most of the Benefits in the Nineteen-Page List are also Not Extended to Unmarried, Heterosexual Couples**

As explained by Justice Levinson in *Baehr v. Lewin* at pg. 559, in Hawaii, since 1920, people living in "common law marriage" (cohabiting without being legally married) have consistently been refused marital benefits.<sup>169</sup> The majority's recommendations are contrary to this long-maintained policy and constitute a step backward for Hawaii as a culture. Hawaii has long zealously guarded the definition of marriage, having codified it in 1872. Were the legislature to permit homosexual couples to enjoy the benefits of marriage more than one hundred years of social policy in Hawaii would be changed in one fell swoop. In addition, were these marital benefits not granted to unmarried heterosexual couples under a domestic partnership statute, then the claims in the *Baehr v. Miike* case would again be created in our statutes. Heterosexual couples could complain that they have been singled out as the only group of people not to receive the marital benefits on the basis of their sex if, as heterosexuals, they do not qualify for Domestic Partnership status. However, the cost to society of extending marital benefits to all unmarried adults would possibly crush the economy of Hawaii. No study has been done to determine the effect of these domestic partnerships in our state.

### **G. Most of the Few Specific Legal and Economic Benefits Actually Discussed by the Commission are Not Denied to Homosexual Couples Since Already Available to Other Means and Therefore are Not Major Benefits of Marriage**

The definition of major legal and economic benefits, which the majority of the Commission rejected, sought to look at significant legal and economic benefits, and determine if the same benefit was available to unmarried same-sex couples through an avenue or means other than being legally married. If so, then the benefit would not qualify as a major legal and economic benefit extended to married opposite-sex couples but not to same-sex couples.<sup>170</sup> Most of the few specific legal and economic benefits actually discussed by the Commission are already available to same-sex couples. Most of the estate planning, control of medical treatment, retirement benefits, power of attorney, life insurance benefits, etc. are available to same-sex couples.

In addition, many of the benefits the majority found to be unavailable to same-sex couples are unavailable based on the majority's definition of "family". The availability of the benefits to "family" members, in the absence of a definition of "family" which expressly

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169. See, also, *Catherine Hyde Aehegma v. Aelbert Aehegma*, 8 Haw. App. 215 (1990).

170. See Section III.C.(6) in this Minority Opinion, above.

included same-sex couples, led the majority of the Commission to assume that these benefits were denied same-sex couples. However, the definition of "family" did not specifically exclude same-sex couples, and indeed often the state agency would extend these benefits to same-sex couples.<sup>171</sup>

**H. The Few Legal and Economic Benefits Which were Actually Discussed by the Commission were Based on Faulty Economic Analysis and Therefore do Not Provide the Foundation for the Conclusions Drawn by the Commission**

As discussed above, the Commission mis-defined major legal and economic benefits to include any benefit no matter how small or unlikely to be used, failed to reduce expected economic value to true economic value, and failed to review the Nineteen-Page List of statutes appended to the majority report as the compilation of legal and economic benefits. Consequently, these efforts of the Commission do not support the conclusions drawn by the Commission. Whether there are in fact major legal and economic benefits extended to opposite-sex married couples but not to same-sex couples has not truly been examined by the Commission.

However, that is not to say that there are no major legal or economic benefits reserved solely for married couples. Justice Levinson recited the now seventy-five year history of our state "zealously guarding the state's role as the exclusive progenitor of the marital partnership..."<sup>172</sup> and it is safe to assume that there are major legal and economic benefits reserved for that marital partnership. That is addressed below at section IV. E. 1 below. The point simply is that the majority of the Commission failed to analyze the statutes in a manner to report what the legislature charged the Commission to examine.

**I. There is No Evidence Whatsoever that Granting Marital Benefits to Homosexual Couples will Increase Tourism Revenues in the State of Hawaii**

For twenty-three years Dr. Ghali studied Hawaii's economy as a tenured professor in the Economics Department at the University of Hawaii. He has published the authoritative analysis of Hawaii's economy, including a model containing more than one hundred variables.<sup>173</sup> Dr. Ghali testified to the Commission that Dr. La Croix had no support for the economic evaluation prepared by Dr. La Croix, and that Dr. La Croix could not conclude whether there would be a positive or negative effect on Hawaii's tourism resulting from

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171. See *Interim Report from the Commission on Sexual Orientation and the Law*, January 17, 1995, particularly description of Chapter 201E, *Hawaii Revised Statutes*, in Appendix B of that report.

172. *Baehr v. Lewin*, 74 Haw. 530, 559 (1993) quoting *Parke v. Parke*, 25 Haw. 397, 404-05 (1920).

173. A copy of that book was donated to the Commission's library by Dr. Ghali.

MINORITY OPINION

homosexual marriage. Dr. La Croix then admitted that his figures presented to the Commission are "unreliable".<sup>174</sup>

Although it has been reported in the local press that extending marital benefits to homosexual couples will result in an increase in tourism revenues to the State of Hawaii, there is absolutely no valid data to support that claim. The claim arose out of an article written by Jennifer Gerarda Brown, published in 1995 in the *Southern California Law Review*.<sup>175</sup> However, both Dr. Ghali and Dr. La Croix opined that her economic analysis was completely faulty. Dr. Ghali testified to the Commission that "Professor Brown has chosen to present her argument as an economic proposition. We treated it as such and found it has no merit."<sup>176</sup>

Dr. La Croix<sup>177</sup> agreed that if additional tourists do come to Hawaii because of same-sex marriage here, in order for the net economic effect to be positive, the net revenue generated, after considering the expenses of providing the tourism services and after considering the costs involved with the burden on infrastructure, must be greater than the decrease in tourism dollars resulting from tipping (the lowering of the value of visiting Hawaii for non-homosexual tourists in response to the same-sex marriage policy).

However, at least one tourist location in New York has greatly suffered as a result of the increase in the homosexual population. In "The Boys of the Beach," Midge Decter, a celebrated author, wrote in a piece in *Commentary* magazine about the change in milieu at Fire Island due to the increase in the homosexual population. She writes that:

At the end of our fifth summer in the Pines, we decided not to return there any more. There were a number of reasons for this decision, but prominent among them was the fact that the balance between the homosexuals and the straights had clearly begun to tilt. The former were growing ever more numerous and concomitantly ever less circumspect both in their public demeanor and in their private behavior toward us... In any case, our once friendly neighbors were beginning to indicate to us in all sorts of ways--from a new shrillness of voice to the

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174. Because of this exchange at the October 11, 1995 meeting, the refusal by the Chairman to complete the correction to the minutes appears to be related to the substance of the meeting and the testimony of the economists. The October 11, 1995, meeting minutes were finally resolved on December 4, 1995; the majority voted not to include this admission of Dr. La Croix in the minutes, as though it was never said.

175. Jennifer Gerarda Brown, "Competitive Federalism And The Legislative Incentives To Recognize Same-Sex Marriage," *Southern California Law Review*, Vol. 68, No. 4 (1995), pgs. 745-839.

176. See also, Minutes of October 11, 1995, for Dr. Moheb Ghali's "Hawaii, Tourism and Same-Sex Marriage, A Testimony Before the Commission on Sexual Orientation and the Law," attached in Appendix I.

177. See Minutes of October 11, 1995, for testimonies of Sumner La Croix, Ph.D., and James Mak, Ph.D., attached in Appendix I.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

appearance of drag costumes in the afternoon to a provocative display of social interest in our teenage children--that the place was getting too small to contain the tastes and wishes of both communities.<sup>178</sup>

It is currently unknown whether such an increase in our homosexual population will have a positive or negative effect on tourism. Dr. La Croix could not estimate whether the net effect on tourism dollars would be positive or negative. Dr. Ghali and Dr. La Croix agreed that it would take several years of research to answer the question.

The arguments for economic benefit is based on several other fallacious assumptions. First, if Hawaii legalizes same-sex marital rights but no other state does, it will do no good for same-sex couples from other states to come to Hawaii, get married or form domestic partnerships, then return to their home states to live because their home states do not recognize the marital rights. The "marital rights" would be a legal nullity. Why would people incur substantial expense for a legal nullity? Second, if even just one other state legalizes same-sex marital rights, Hawaii will lose the "only state" advantage and with it all the pie-in-the-sky economic benefits. If legalizing same-sex marital rights is economically so advantageous, will all other states refuse to enter the same-sex marriage market? When they do, what will happen to Hawaii? For example, who goes to Reno for divorce any more? Would Hawaii have scared off the family vacation business only to find that the homosexual vacation business is divided up among other states (more convenient for homosexuals on the mainland to get married)? Third, if Hawaii is going to sell out its family values and moral integrity for economic gain, there are a lot of other things it could "put on the market" that would probably generate more money than merely legalizing same-sex marriage. For example, if Hawaii is willing to legalize same-sex marriage, why not legalize prostitution, gambling, marijuana, or even better, child prostitution? That would probably be even more lucrative--in the short term. Fourth, the claims of economic benefit to Hawaii are based on fantasized assumptions about the numbers of homosexuals, the number of same-sex couples who would want to marry, how many of them would fly to Hawaii to marry, and how much they would spend. Even the economic gains predicted by the pie-in-the-sky analysis are not very great, especially if they are one-time, short-lived benefits. Fifth, the costs factor must be considered. That is, what economic impact will result from the same-sex couples that come to Hawaii to get married, and stay in Hawaii? With a domestic partnership status, they would almost certainly have to reside here to benefit from the statute. Would Hawaii become a haven for same-sex couples? If so, would the public health costs not rise?<sup>179</sup> If so, how much financial burden will that impose on the families of Hawaii? For example, how many new schools would not be built, and how many programs for needy women and children would be sacrificed to pay for the increased public costs associated with luring the same-sex

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178. Midge Decter, "The Boys on the Beach," *Commentary*, Volume 70, No. Three, September, 1980, pg. 45.

179. See, "Hard-Hit Key West Combats AIDS With Community Effort," *New York Times*, September 3, 1990, pg. 8; "In Key West, the Latest 'Invaders' Have Set Off a Backlash," *New York Times*, April 7, 1979, pg. 10; "Nights Are Long And Liquid at Key West" *New York*

traffic to Hawaii? Who knows what these costs might be? The Commission certainly did not investigate them, and no recommendation to legalize same-sex marital rights of any kind can be taken seriously until these dimensions of the issue have been thoroughly considered.

**IV. The Majority of the Commission Refused to Examine Significant, Substantial Public Policy Reasons Not to Extend Benefits in Part or in Total to Same-sex Couples**

Although the majority and minority opinions appear to address the full range of public policy issues related to homosexual marital rights, these issues were not discussed among the Commissioners except in the drafting of the report language. As a draft of the report became available, the minority discovered the majority's position on the public policy issues. However, no discussion, debate or attempted resolution of apparently mutually exclusive positions, was had. Instead, the reports present the opposing positions, and at that, presented in a way which could lead the reader to assume that the points of view were debated by the Commissioners without resolution of the differences. Nothing could be further from the truth. In fact, not only did the Commission not discuss the minority's perspective, but the majority precluded such testimony whenever possible.

**A. The Majority of the Commission Refused to Permit Testimony Via Long Distance Telephone by National Traditionalist Experts on the Public Policy Issues**

Several nationally known experts on issues concerning social policy considerations related to homosexual marital rights were invited by Commissioner Hochberg to testify at the meeting of the Commission at which social policy matters were to be examined. Because these experts live on the Mainland, they were not able to arrange to visit Hawaii on the short notice permitted by the Commission meeting schedule. However, Dr. Dallas Willard, Dr. Joseph Nicolosi, Roger M. Magnuson, Esq. and Richard Duncan, Esq. committed to be available for telephone testimony on October 11, 1995, as follows:

1. Testimony by Dallas Willard, Ph.D., Philosophy Professor at the University of Southern California (USC), would have addressed the ethical and philosophical issues attendant to recognition of homosexual relationships on par with heterosexual marriage;

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*Times*, January 24, 1977, pg. 12; "Island Town Weathers Storm in Mayoral Race," *New York Times*, November 11, 1983, pg. A18; "Multiple Sclerosis Causing Concern In Key West," *New York Times*, November 20, pg. C13.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

2. Testimony by Joseph Nicolosi, Ph.D., a clinical psychologist who has for more than twenty years successfully treated homosexuals in psychotherapy, would have addressed the psychoanalytical issues concerning homosexuality and the impact thereof on recognition of homosexual relationships on par with heterosexual marriage;
3. Testimony by Roger M. Magnuson, Esq., author of many articles and books, including *Informed Answers to Gay Rights Questions*, would have addressed the legal and public policy issues attendant to making behavior-based characteristics of homosexuality the basis for protected class status by recognizing homosexual relationships on par with heterosexual marriage; and
4. Testimony by constitutional law professor Richard Duncan, Esq., the Sherman S. Welpton, Jr. Professor of Law, at the University of Nebraska College of Law, would have addressed the constitutional law issues attendant to recognition of homosexual relationships on par with heterosexual marriage.

The majority of the Commission voted not to extend to these nationally known experts the opportunity to testify by telephone. No written basis for the refusal was given. However, Winfred Pong, Esq., deputy attorney general, State of Hawaii, orally informed Ms. Martin of the LRB that telephone testimony would not be permitted because Chapter 92 required testimony in person.<sup>180</sup>

Certainly the Commission's work would have been more complete had these experts addressed the Commission, and perhaps the conclusions reached by the majority of the Commission would have been different. This is not likely, based on the strong pro-homosexual bias of the majority. However, Mr. Magnuson provided each Commissioner with a copy of his book *Informed Answers To Gay Rights Questions*, Dr. Nicolosi provided significant written materials concerning the psychological pathology of homosexuality, and Professor Duncan suggested a sweeping religious exemption in a one-page letter which referenced his *Notre Dame Journal* article on the religious freedom issues.<sup>181</sup> Only Dr. Willard was able to send written testimony directed specifically to the Commission and its work.

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180. However, Commissioner Hochberg later discussed this matter with Mr. Pong. Mr. Pong stated that Chapter 92 permitted only written testimony or presence in the meeting in person. Mr. Pong stated that telephonic presence did not constitute presence. Mr. Pong informed Commissioner Hochberg that no research was conducted to make that determination. Instead Mr. Pong simply read the section of Chapter 92 and made his ruling. Mr. Pong was unaware of the fact that even corporation boards of directors, although not permitted to vote by proxy, are permitted by law to have meetings via teleconference. Later, in November, 1995, it was revealed to the Commission that video conferencing would be permitted but that there was then insufficient time to promulgate the rules as required.

181. Magnuson, Roger. *Informed Answers to Gay Rights Questions*, Multnomah Books, Questar Publishers (P.O. Box 1720, Sisters, Oregon 97759), 1994;

## MINORITY OPINION

None of the written submissions from these experts was discussed or referenced by the majority of the Commission.

### **B. The Majority of the Commission Ignored Testimony and Information Concerning the Negative Impact of Domestic Partnerships and/or Same-sex Marriage on Children and the Family but Adopted the Sole Viewpoint of Dr. Bidwell, Known to Support Same-sex Marriage**

Although rejecting the overwhelming evidence to the contrary, the majority of the Commission adopted Dr. Bidwell's testimony that no evidence exists to deny homosexual parenting rights.<sup>182</sup> Dr. Bidwell admitted he was not trained in psychology or psychiatry but was a developmental pediatrician. However, at the October 11, 1995 Commission meeting, Dan Kehoe, Ph.D. (clinical psychologist) testified concerning his more than twenty years experience as a school psychologist counseling school children. It is his professional opinion that:

Homosexuality is in part a pathological condition and can derive directly from disturbed childhood development. Homosexuality is often the result in large measure of a flawed confusion regarding psychosexual cross identifications. Clearly, a developing child will be deprived of this most elemental process when reared by a homosexual couple... Social Science data has long documented numerous studies showing detrimental effects of homosexual parenting on children. These studies include but are not limited to Bigners and Bozetts, 1990; Riddle and Arguellis, 1981; Lewis, 1980; Bozett, 1980, 1981; Humphreys, 1979; Spada, 1979; and Pennington's work in 1987 which was based on ten years of clinical experiences.<sup>183</sup>

The majority had invited the testimony concerning the impact of same-sex marriages on children and the family from Robert J. Bidwell, M.D., a homosexual pediatrician who advocates the homosexual lifestyle and the conferring of benefits on couples engaged in that lifestyle. Dr. Bidwell is well-known in Hawaii as a homosexual activist.<sup>184</sup>

Notwithstanding that Dr. Bidwell is not a psychologist or psychiatrist, he testified that he had only been able to find one study which indicates anything negative regarding gay and

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Duncan Richard, "Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom," *Notre Dame Law Review*, Vol. 69, Issue 3, 1994, pgs. 393-445.

182. See, John Finnis, "Shameless Acts in Colorado: Abuse of Scholarship in Constitutional Cases," *Academic Questions*, Vol. 7, No. 4, page 10, Fall, 1994. John Finnis is professor of law and legal philosophy, Oxford University and Fellow of University College, Oxford.

183. See Minutes of October 11, 1995, for testimony of Dan Kehoe, Ph.D.

184. Dr. Bidwell has been instrumental in attempts to include the teaching of homosexuality as a viable alternative lifestyle in Hawaii's public school system, and who played a leading roll in placing the controversial Teen Line program in Hawaii's public schools. The Teen Line program contained recordings which students could access to answer their questions on

lesbian parents. According to Dr. Bidwell, that study was conducted in 1973 and used only 16 subjects. However, when asked, Dr. Bidwell was unable to tell the Commission which computer word-search terms he used in his research, so no cross-checking was possible. Although he acknowledged the fact that most current research into homosexuality issues is done by homosexual scientists, and their work is criticized as biased, he was unable to say whether the favorable studies he relied on for his opinions were conducted by homosexual or heterosexual researchers. He did not have information about the testimony of Dr. Kehoe or a widely published author named Paul Cameron who has written prolifically on many aspects of homosexuality.<sup>185</sup>

In addition, available to the Commission is a testimony by Lawrence Burtoft, Ph.D., reporting on Diana Baumrind's (University of California at Berkeley) review of a study by J.M. Bailey on the sexual orientation of adult sons of gay fathers. She questioned Bailey's conclusion that children of gay men and lesbians are not more likely than children of heterosexuals to adopt a homosexual orientation:

I question their conclusion on theoretical and empirical grounds. Theoretically, one might expect children to identify with lifestyle features of their gay and lesbian parents. One might also expect gay and lesbian parents to be supportive rather than condemnatory of their child's non-normative sexual orientation.<sup>186</sup>

Baumrind addresses her empirical basis for her doubts, which concern the disproportionate numbers of sons who were identified as homosexual compared to general population figures.

Repeated studies have placed the percentage of exclusive male homosexuals at 2-3%.

This would indicate that sons of gay parents are three times as likely to be homosexual than those raised by heterosexual parents.<sup>187</sup>

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numerous subjects. The tape library included a recording which equated homosexuality with being left handed.

185. See the following articles: Cameron, Paul; Playfair, William L., and Wellun, Stephen, "The Homosexual Lifespan," paper prepared for Family Research Institute; Cameron, Paul and Kirk Cameron, "Homosexual Parents" paper prepared for Family Research Institute; Cameron, Paul "What Causes Homosexual Desire and Can It be Changed?"; Cameron, Paul and Kirk Cameron, "The Prevalence of Homosexuality," paper prepared for Family Research Institute.
186. Lawrence F. Burtoft, Ph.D., Social Research Analyst Public Policy Division, Focus on the Family, "Testimony on House Bill 1171" presented before The House Children and Family Services Committee, State of Washington, February 14, 1995.
187. Lawrence F. Burtoft, Ph.D., Social Research Analyst Public Policy Division, Focus on the Family, "Testimony on House Bill 1171" presented before The House Children and Family Services Committee, State of Washington, February 14, 1995.

## MINORITY OPINION

Thus, according to Dr. Lawrence Burtoft, in testimony before the Washington legislature, children raised by homosexual parents may have a disproportionate chance of duplicating the statistical findings related to homosexuals' extremely high medical health risks, relational instability and sexual promiscuity, elevated mental health risks, social disapproval and ostracism and risk of molestation.

Homosexuals are found to be disproportionately more likely to be involved in child molestation. Approximately 35% of child molesters are homosexual.<sup>188</sup> Depending upon whether one accepts the 2% or 6% population figure, male homosexuals are six to seventeen times more likely to be involved in child sexual abuse.<sup>189</sup>

Dr. Burtoft's testimony addressed whether homosexual, bisexual, transsexual or transvestites should be permitted to be adoptive, foster or placement parents. His opinion in summary is that they should not because the homosexual family setting is harmful to children. The state's primary concern is to do all within its power to seek the optimal family setting. His opinion is that:

[g]iven that empirical research overwhelmingly identifies the biological family as most suited to the well-being of children; given the large amount of research indicating the negative factors associated with homosexuality; and given that even the small amount of research on gay and lesbian parents points to an increased likelihood of harm.

the best interest of children requires that homosexual, bisexual, transsexual or transvestites should not be permitted to be adoptive, foster or placement parents.<sup>190</sup> His reasoning applies equally to the issue before the Commission because adoption and family rights accompany legal recognition of the homosexual couple.

Further, despite Dr. Bidwell's testimony to the contrary, the overwhelming bulk of the evidence indicates that homosexual relationships threaten the very core of our society--the family. The following provide some of the most telling examples:

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188. Freund et al., "Pedophilia and heterosexuality vs. homosexuality," *Journal of Sex and Marital Therapy* 10:3 (Fall 1984) 197; Cameron, P., "Homosexual molestation of children/sexual and interaction of teacher and pupil," *Psychological Reports* 57 (1985) 27-36. Cited in Schmidt, Thomas E., *Straight and Narrow? Compassion and Clarity in the Homosexuality Debate* (Downers Grove, IL: InterVarsity Press, forthcoming May 1995). See also, Seymour L. Halleck, "Emotional Affects of Victimization," in *Sexual Behavior and the Law* (ed. R. Slovenko, Springfield: Charles C. Thomas, 1963). See, Lynda S. Doll, Dan Joy, et al., "Self-Reported Childhood and Adolescent Sexual Abuse Among Adult Homosexual and Bisexual Men," *Child Abuse & Neglect*, Vol 16, pgs. 855-86, 1992.
  189. Lawrence F. Burtoft, Ph.D., Social Research Analyst Public Policy Division, Focus on the Family, "Testimony on House Bill 1171" presented before The House Children and Family Services Committee, State of Washington, February 14, 1995.
  190. Lawrence F. Burtoft, Ph.D., Social Research Analyst Public Policy Division, Focus on the Family, "Testimony on House Bill 1171" presented before The House Children and Family Services Committee, State of Washington, February 14, 1995.

a. Writing for the *Alabama Journal of Medical Science* in July, 1978, Harold M. Voth, M.D., a senior psychiatrist and psychoanalyst at the Menninger Foundation in Topeka, Kansas wrote:

The crucible from which all life springs is the family. The events within the family can make or break the individual and, collectively, civilization. This fundamental unit is the building block and was the building block of all social organizations from the tribe, village, and onto the most highly developed societies and civilizations. Will Durant said **the family can survive without the state, but without the family all is lost.** Therefore, not only must the family survive, but its internal workings must function in ways that turn out strong men and women--not weak ones who eventually become casualties of one form or another or who may work actively against the best values and traditions of our country.

The underpinnings of personality are biologic underpinnings. None are more fundamental than the biologic imperatives which lead to the psychological qualities of maleness and femaleness.... **One of the most fundamental functions of parenting is to evoke, develop, and reinforce gender identity and then proceed to shepherd the developing child in such a way as to bring his psychological side into harmony with his biological side, and thereby develop a solid sense of maleness or femaleness.**

... **Human beings are not biologically bisexual, despite what the gay liberationists would have us believe.** The human spirit is greatly impaired when childhood development does not lead to fully developed masculinity or femininity. Fully masculine men and feminine women are by definition mature, and that term implies the ability to live out one's abilities. These include the capacity to mate, live in harmony with a member of the opposite sex, and carry out the responsibilities of parenthood. Mature people are competent and masterful; not only can they make families but they can take hold of life generally and advance it, and in particular they can replace themselves with healthy children who become healthy men and women.... **The fate of mankind depends on the durability of the heterosexual relationship, and the stability and integrity of the family.** (Emphasis added.)<sup>191</sup>

Dr. Voth goes on to point out that homosexuality is on the increase, and is an abnormal condition, the cause of which has been unequivocally traced to childhood experiences within the family and to the personalities of parents and the nature of their relationships.

**One's biology does not cause the condition. The increase in this form of psychopathology is directly related to the faulty psychological development of the child within his disturbed family. It is an ominous fact that the gay movement is**

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191. Harold M. Voth, M.D., "The Family and the Future of America, *The Alabama Journal of Medical Sciences*, Vol 15, No. 3, July 1978 at 310, 311.

MINORITY OPINION

**having its way of life redefined as a simple variant of normal human sexuality and woven into the fabric of society. (Emphasis added.)**<sup>192</sup>

Dr. Voth points out that Dr. Abram Kardiner, a distinguished physician, psychoanalyst and anthropologist, notes that homosexuality reaches an epidemic level in societies in crises or in a state of collapse. Says Dr. Voth: "I am vehemently opposed to having this condition called normal. We are indebted to those persons who call a spade a spade on this issue."<sup>193</sup> Dr. Voth concludes:

The key link in the whole chain is the pivotal point around which all societies turn, the family. Everyone must turn attention to the task of making it flourish.... We must fight back against the social movements which are destructive to our way of life.... This means, above all, preventing the passage of laws which ignore the differences between a male and a female, and which undermine the security and stability of the family and the nation. Strong pioneer families created this country, strong families and strong leaders will save it.<sup>194</sup>

b. The social arrangement that has proved most successful in promoting the social development of the child and ensuring his or her physical survival is the family unit of the biological mother and father.<sup>195</sup>

c. When children do not receive parenting from a masculine father and a feminine mother who are firmly bonded together--when they do not grow up in a healthy family--their own effectiveness is inevitably weakened and their identity may become blurred. Some emerge with an identity of the opposite sex. Inevitably, a price is paid for these deviations away from what might have developed. These individuals always lack the effectiveness they might have had. **"Hostility among the sexes, along with role blurring and identity confusion, cost both the individual and society heavily."** (Emphasis added.)<sup>196</sup>

d. Throughout the history of Anglo-American jurisprudence, homosexual behavior has been sometimes tolerated, but never legitimated. In part, this is because, as evidenced by historical and sociological evidence, such behavior is incompatible with long-term societal well-being. If what Hawaii citizens desire (though some may not) is a stable yet dynamic long-lasting society, we must foster strong family units, effective education of the young, reduction of sexual harassment and exploitation, and a decrease in sexual-behavior-related health problems. These are all goals which are undermined by homosexual behavior. What is at

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192. *Id.* at 314.

193. *Id.*

194. *Id.* at 315.

195. Barbara DaFoe Whitehead, "Dan Quayle Was Right," *The Atlantic Monthly*, April 1993 at 48.

196. Harold M. Voth, "The Future of America," *Military Medicine*, Vol 145, No. 3, March 1980 at 169, 173.

issue in Hawaii today regarding dealing with homosexual behavior is not really a civil rights discrimination issue but an issue of societal well-being. "Self-gratifying (homo) sexual interests should not masquerade under the "rights" banner, but rather should always be subordinated to the overall welfare of society."<sup>197</sup>

The evidence about homosexuality shows that our society will be damaged by granting homosexual marital rights. As Charles Socarides, M.D., a preeminent psychiatrist, wrote in 1995:

Homosexuality cannot make a society, nor keep one going for very long. It operates against the cohesive elements of society. It drives the sexes in opposite directions. And no society can long endure when either the child is neglected or when the sexes war upon each other... Regarding homosexuality as a normal variant of sexual activity... militates against the family and destroys the function of the latter as the last place in our society where affectivity can still be cultivated.<sup>198</sup>

Vitality of society depends on the continued vitality of male/female relationships to build family and community. Homosexuality operates against this, both because of the failure to draw together partners of different sexes, and because of the effect on society of segregation by sexes. In addition, throughout history, healthy civilization is found only when society highly values preservation of sexual expression within the male/female marriage partnership at the exclusion of all other sexual expression.

The scholar J.D. Unwin published his study of 86 different historical societies in *Sex and Culture*, reviewed in *Christianity Today* by Philip Yancy in 1994. Mr. Yancy writes:

In human records there is no instance of a society retaining its energy after a complete new generation has inherited a tradition which does not insist on pre-nuptial and post-nuptial continence'... [J.D. Unwin] found with no exceptions that [Roman, Greek, Sumerian, Moorish, Babylonian, and Anglo-Saxon] societies flourished during eras that valued sexual fidelity. Inevitably, sexual mores would loosen and the societies would subsequently decline, only to rise again when they returned to more rigid sexual standards.<sup>199</sup>

According to David McWhirter and Andrew Mattison, the two most noted homosexual researchers of homosexual psychology, the homosexual community does not define relational fidelity as sexual exclusiveness.

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197. Phillip Colton Smith, Ph.D., "Homosexuality".

198. Charles W. Socarides, M.D., *Homosexuality A Freedom Too Far*, Adam Margrave Books, 1995, pg. 311, quoting Dr. Abram Kardiner, an expert in the psychoanalytic investigation of cultures.

199. Philip Yancey, "The Lost Sex Study," *Christianity Today*, December 12, 1994 pg. 80.

MINORITY OPINION

Sexual exclusivity among [homosexual] couples is infrequent, yet their expectations of fidelity are high. **Fidelity is not defined in terms of sexual behavior but rather by their emotional commitment to each other.** Ninety-five percent of the couples have an arrangement whereby the partners may have sexual activity with others at some time under certain conditions... Stated another way, all [homosexual] couples with a relationship lasting more than five years have incorporated some provision for outside sexual activity in their relationships.<sup>200</sup> (Emphasis added.)

Consequently, creating homosexual marital rights constitutes a loosening of sexual mores which historically caused the decline of societies. Such a policy determination must not be undertaken without the most serious analysis.

Finally, what is very enlightening and should serve as a real warning of things to come should this legislature decide to legitimize homosexual marriages and/or domestic partnerships is the fact that homosexual activists themselves espouse the destruction of the family unit. Some of the most "salient" examples are:

a. Paula Ettelbrick, a Lesbian activist and former director of the Lambda Legal Defense and Education Fund and now the policy director for the National Center for Lesbian Rights, supports the "right" of homosexuals to marry, but opposes marriage as oppressive in and of itself. According to Ms. Ettelbrick, homosexual marriage does not go far enough to transform society.

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so... Being queer means pushing the parameters of sex, sexuality, and family, and in the process, **transforming the very fabric of society....** As a lesbian, I am fundamentally different from non-lesbian women.... **In arguing for the right to legal marriage, lesbians and gay men would be forced to claim that we are just like heterosexual couples, have the same goals and purposes, and vow to structure our lives similarly... We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's views of reality.**<sup>201</sup>

b. In April 1994, *Genre*, a homosexual-oriented magazine, examined current practices among male homosexuals who live with partners. According to the article, the most successful such relationships are possible largely because the partners have "outside affairs."<sup>202</sup> The article went to say that in 1993, David P. McWhirter and Andrew M. Mattison, authors of *The Male Couple*, reported that in a study of 156 males in loving relationships

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200. McWhirter & Mattison, *The Male Couple; How Relationships Develop*, Prentice-Hall, 1984, pg. 252.

201. Knight, Robert H., "How Domestic Partnerships and "Gay Marriage" Threaten the Family," *Insight*, Family Research Council, Washington, D.C., at 4 (quoting Paula Ettelbrick, "Since When is Marriage a Path to Liberation?", in Rubenstein, *op. cit.*, pgs. 383-395).

202. *Id.* at 8 (quoting Doug Sadowick, "Open Door Policy," *Genre*, April 1994, pg. 34).

lasting from one to 37 years, only seven couples considered themselves to have been consistently monogamous... It should be recognized that what has survival values in a heterosexual context may be destructive in a homosexual context,... Life-enhancing mechanisms used by heterosexual men and women should not necessarily be used as a standard by which to judge the degree of a homosexual's adjustment. In other words, to adapt heterosexual models to homosexual relations is more than just foolhardy; it's an act of oppression."<sup>203</sup>

**C. The Majority of the Commission Refused to Discuss the Impact of Same-Sex Marriage or Domestic Partnerships on the Overall Health of the Community**

In recent years, rising health care costs attracted and maintained the attention of the media, politicians, as well as people in the public and private sectors. Much discussion has occurred generally on how to reduce rising health care costs in order to gain control over growing government budgets in times of shrinking public funds. However, the majority refused to address these issues in relation to homosexual marital rights, notwithstanding the significant health care issues in the homosexual community. Some salient examples are:

1. The weight of evidence of widespread health problems in the homosexual community appears as robust as is that against smoking.<sup>204</sup> "Medical specialists have long known the disproportionate impact on the homosexual population of diseases like gonorrhea, syphilis, Hepatitis A, Hepatitis B, cytomegalovirus, amoebic bowel disease ('gay bowel syndrome), and herpes."<sup>205</sup>
2. Based on obituary information collected from 947 obituaries published "The Blade," a homosexual-oriented magazine, 804 (87%) of the 947-person sample died of AIDS or AIDS-related illness, only 123 died of other causes. Of those who died of AIDS, 361 had a long-time sex partner, and the median age of death was 37. Of the 947-person sample, 426 did not have a long-time sex partner, and their median age of death was also 37. Fifteen died married to a wife, and their median age of death was 44. Of those who die of AIDS, 49 had long-time sex partners, and their median age of death was 41. Seventy-five did not have long-time sex partners, and their median age of death was also 41.<sup>206</sup>

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203. *Id.* at 8-9 (quoting Doug Sadowick, "Open Door Policy," *Genre*, April 1994, pgs. 35, 36).

204. Cameron, Paul, "Effect of Homosexuality Upon Public Health and Social Order," *Psychological Reports*, 1989, 64, 1177.

205. Roger J. Magnuson, "Declaration of Roger J. Magnuson," Civil No. 91-00712 ACK, United States District Court For the District of Hawaii, pg. 9. See also, Paul Cameron, Ph.D., "Sexual Orientation and Sexually Transmitted Disease".

206. Paul Cameron, et al., "The Homosexual Lifespan".

## MINORITY OPINION

3. The primary sexual activity of gay males is, without reference to disease, anatomically unhealthy.<sup>207</sup>
4. Taking disease into consideration, the primary sexual activity of gay males is well known to result in AIDS. Specifically, as of June 30, 1993, 315,390 cases of AIDS had been reported. Of those cases, 191,642 were homosexual and bisexual men. In other words, homosexual and bisexual men account for 61% of all AIDS cases. Since homosexual males make up approximately 2% of the population, this means they are 30 times more likely to contract HIV.<sup>208</sup>

Common sense dictates that extending marriage benefits to individuals that comprise such an inordinate health risk will cause the cost of health care to escalate for heterosexual families. Moreover, extending such benefits punishes those who do not condone homosexual activity for religious or moral reasons, by requiring those individuals to pay the cost for 2% of the population's aberrant behavior. In fact, the lower health insurance premiums available to families but not homosexuals, cited by the majority as a desired homosexual marital benefit, would be negatively impacted by any increased cost of providing medical treatment once homosexuals were permitted to obtain that reduced premium medical coverage. Is it appropriate to increase the cost of health care for families in order to give family health care premium rates to 2% of the population? Such an issue should have been debated by the Commission, however, it was not discussed.

### **D. The Majority of the Commission Refused to Consider Any Reasons for Not Extending the Benefits Afforded Opposite Sex Married Couples to Same-Sex Couples**

The majority refused to permit the minority to have any input whatsoever in the Commission's findings and recommendations. At the October 26, 1995 continuation of the October 25, 1995 meeting, the Commissioners first discussed the content of the Commission's proposed work. Commissioners Hochberg and Sheldon attempted to suggest opposing viewpoints. However, the Chairman refused to permit any such minority input to be included in the working draft and required the minority to simply write their own report. Honest debate on both sides of all the issues did not occur.

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207. Larry Burtoft, Ph.D., *The Social Significance of Homosexuality, Questions and Answers*, also distributed as *Setting the Record Straight*, 1994, pgs, 33, 34.

208. *Id.*

**E. Homosexuality is a Psychological Pathology Which is Not Equivalent to Heterosexuality; Many Homosexuals are Cured of Their Homosexual Desires Every Year, and Therefore, Homosexuality is Not an Immutable Trait, but is Instead a Conduct-Based Psychological Disorder**

**1. Homosexuality is Not Equivalent to Heterosexuality and Homosexuality Should not Receive the Benefits and Protection Afforded Heterosexuality**

The majority of the Commission failed to consider whether homosexuality and heterosexuality are so distinctly different that the two cannot be equivalents. However, significant evidence of that fact was available to the Commission, but ignored. The interests of society in marriage and family have justified substantial regulation of marriage throughout history. Aristotle taught that it was the first duty of legislators to establish rules regulating entrance into marriage.<sup>209</sup> Throughout history societies have given unique and special preference to heterosexual marriage because of the benefits that those relationships provides for society in general, and for individual women, men, and children.

To justify giving similar preferred legal protection to same-sex couples, it is necessary to consider the social purposes of marriage, and to compare heterosexual unions with same-sex unions in terms how each relationship furthers those purposes.

It is important to not oversimplify and distort the heterosexual-marriage position. We acknowledge that two men or two women may share a deep, meaningful personal relationship with each other (usually called "friendship"), support each other, develop and pursue mutually-fulfilling, socially beneficial common interests, make strong commitments to each other, and in many ways be as good citizens as persons in heterosexual marriages. However, we believe that same-sex unions simply do not equate with heterosexual union of husband and wife in terms of the purposes of marriage.

We believe that the majority's Commission Report denies and devalues the unique strengths and social contributions of heterosexual marriage, and that legalization of same-sex marriage or domestic partnership would put the state in the position of presenting a false image of both marriage and of same-sex unions. We agree with Governor Pete Wilson of California who said, when he vetoed a much narrower, much more modest domestic partnership proposal last year: "Government policy ought not to discourage marriage by offering a substitute relationship that demands much less - and provides much less than is needed by the children...and ultimately much less than is needed by society."<sup>210</sup> He also

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209. See Aristotle, *Politica*, in 10 *The Works of Aristotle*, 1334-1335 (W. Ross ed. 1921).

210. See "Wilson's Veto Kills Domestic Partnership Bill," *San Francisco Examiner*, Sept. 12, 1994, at A1.

MINORITY OPINION

stated that government has an obligation to "encourage and reward marriage and the formation of strong families."<sup>211</sup> He added: "A society that devalues marriages, and which accepts illegitimacy as commonplace, encourages the explosion of teenage out-of-wedlock births that California has in fact experienced."<sup>212</sup>

There are numerous social purposes of marriage as to which heterosexual marriages provide tremendous benefits to society that are unequaled by homosexual unions. They are: (1) protecting safe sexual relations, (2) social concerns regarding procreation and child-rearing, (3) protecting the status of women, (4) fostering marital stability, (5) promoting economic security for parents and children, (6) providing for recognition of Hawaii marriages in other jurisdictions, and (7) protecting the foundations of self-government. Clearly, the marriage statute itself regulates who may marry in order to prevent incest (HRS 572-1(1)), to protect children (HRS 572-1(2) and 572-2), to prevent the spread of venereal disease on public health grounds (HRS 572-1(5)) and to prevent bigamy (HRS 572-1(3)).

First, sexual behavior is a central concern in marriage and marriage regulation. Same-sex marriage is, by definition, homosexual marriage because sexual relations between the spouses is an integral part of marriage. Thus, it is disingenuous (and simply erroneous) to suggest, as a plurality of the Hawaii Supreme Court did in *Baehr v. Lewin*, that not all same-sex marriages will be homosexual marriages. If, however, homosexual marital rights are extended to all unmarried people, then marriage would be stripped of all of its value to society and simply reduced to a vehicle for obtaining benefits from government without contributing to society those benefits which were historically given by marriage to society. Moreover, in these days of sex-saturated entertainment, when the exploitation of children in pornography is such a severe problem that Congress has had to pass laws to try to restrain it, when incidents of forcible rape and "date rape" are skyrocketing, when American servicemen incite an international incident bringing dishonor on the nation they serve because of their callous rape of a pre-teen girl in another nation in which they were guests, when children are receiving less sex-education in the home and more on the street, when rates of adolescent sexuality, pregnancy, and even abortion are at near-disaster levels, it would be an act of unforgivable irresponsibility to brush aside the tremendous social interest in regulating sexual behavior.

Moreover, it is the very nature and acts of homosexual behavior that are the core and identifying feature of homosexual relations. It is not friendship between persons of the same gender, or mere cohabitation of persons of the same gender that creates social concern, but the acts of homosexual sexual relations that is at the core of the moral concern. Thus, to try to evade that issue, to refuse (as the majority) to investigate it or even to listen to witnesses discuss it is to evade a critical dimension of the marriage issue.

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211. *Id.*

212. *Id.*

Second, marriage has long been favored because it is the most favorable setting in which to bring children into the world and to raise them. If anything is clear in social science, it is that conventional male-female marriage provides the best environment for the nurture, care, training, education and responsible socialization of children. It is equally clear that children suffer most from the creative "alternative" relationships that adults sometimes pursue for their own adult self-interest. Children are the most numerous (and most innocent) victims of the disintegration of marriage. The impoverishment of children has been shown repeatedly and irrefutable to be a direct result of the change in family structure in the past three decades. Yet, incredibly, the majority of the Commission blithely ignores the suffering of children and proposes yet another radical destructuring of marriage. Why must Hawaii's children pay and suffer for the faddish social experimentation of same-sex marriage or domestic partnership?

The concern for our children is not limited to specific children living with specific parents. Undoubtedly, one can find conscientious and devoted adults caring for children under any kind of family structure. Rather, the greater concern is that children generally will suffer from the message that homosexual marital rights send to all prospective parents--the message that a mother and a father are not both optimally necessary for the raising of children. In a time when fathers are abandoning their children's lives in record numbers, it would be irresponsible to adopt a marriage or domestic partnership reform that sent the false message that same-sex marriage and domestic partnership clearly convey about the disposability of two-gender parenting. A state and society that cares for its children and its future will not be so reckless when the interests, futures and lives of its children are at risk. The law should emphatically model, support, and encourage two-parent, mother-father parenting rather than create yet another ill-considered alternative to that institution that will impose untold misery on yet another generation of Hawaii's children.

Third, studies repeatedly have shown that wives and mothers make the greatest investment in marriage and children, and suffer the greater economic disadvantage when marriage is undermined. Marriage is the one institution which historically has recognized the indispensable equality of women because a man could not have a marriage without a woman. It is the oldest equal rights relationship in law and society. Since male homosexuals outnumber female homosexuals, even this new domestic institution will become just another male-dominated institution. How many mothers in Hawaii will lose custody to their "gay" former husband and his same-sex partner if same-sex marriage or domestic partnership is legalized? The message of same-sex marriage and domestic partnership trivializes the contributions of tens of thousands of Hawaii wives and mothers and says to them, "your contributions to your children, your family, and our society are no different, no better than those of a homosexual partner."

Fourth, fostering marital stability is a great concern of the State. Given the indisputable evidence (summarized elsewhere in the Minority Opinion) of the unavoidably promiscuous, fleeting nature of most same-sex relationships it is facetious to compare the

## MINORITY OPINION

stability of same-sex marriage with conventional male-female marriage--even in these days of high divorce rates marriages are as solid as the Rock of Gibraltar compared to same-sex liaisons. While one might shrug and say it is up to the adults to choose for themselves whether they want one stable relationship or many temporary relationships, that is simply irresponsible when one is talking about marriage, the basic unit of society. Male-female relations are complementary in ways that same-sex relations are not.<sup>213</sup> The law should not pretend otherwise and send false messages about reality simply because that happens to be the popular political fashion of the day. And, again, the people who suffer the most from unstable families are children. Their interest must not be sacrificed to the instability of same-sex relationships.

Fifth, marriage has been repeatedly shown to promote economic security for parents and children. Marital instability is associated with poverty for women and children. Again, the concern is not so much for particular couples because undoubtedly exceptional cases can be found in any family form. The greater concern is for the impact on society and the children of society generally if the law presents unstable unions as the equivalent of and as socially as valuable as real heterosexual marriage. The law should not engage in false advertising. Equating same-sex unions with conventional male-female marriage would clearly send a false message which would hurt untold thousands of individuals and their families when the bitter realities of the instability of same-sex unions set in. Not only are unstable marriages impoverishing for the individuals involved, but they impose heavy costs on society, ranging from the costs to the state (for the agencies typically involved in dealing with family instability--courts, social work agencies, domestic violence, welfare, etc.) but also many great indirect costs resulting from lowered productivity of the individuals involved in the unstable relationship, stress, emotional problems, etc.

Sixth, Hawaii, like all states, has an important interest in providing for recognition of Hawaii marriages in other jurisdictions. Hawaii has an interest in not creating a form of marriage that will not be recognized elsewhere. Indeed, if Hawaii legalizes same-sex marriage or domestic partnership and that new institution is not recognized, persons who rely on the legality of the marriage in Hawaii may find that their rights in other jurisdictions are severely curtailed or rejected. Again, this would do a great disservice to many people. Rights derived from lawful marriages (including inheritance rights, insurance rights, pension rights, property rights, etc.) may be denied in other states and other nations. Spouses and children of a person who once entered into a same-sex marriage and later entered into a conventional marriage could find their marriage-derivative rights were challenged or not recognized in other jurisdictions.

Seventh, the state has a profound interest in preserving society from disintegration. Dr. Socarides opined in 1994:

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213. See Minutes of October 11, 1995, for testimony of Dallas Willard, Ph.D.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

As regards the creation of a new psychosexual institution (i.e., homosexual "marriage") alongside that of heterosexual marriage, I submit the following. The institutions of heterosexuality and heterosexual marriage are created for family structure. To introduce homosexuality as a valid psychosexual institution is to destroy the function of heterosexuality as the last place in our society where affectivity can still be cultivated. Homosexuals cannot make a society, nor keep ours going for very long. It operates against the cohesive elements of society in the name of a fictitious freedom. It drives the opposite sex in a similar direction and no society can long endure when the child is neglected or when the sexes war upon each other.<sup>214</sup>

The adoption of children by homosexual couples is a serious issue. A child should be brought up with a mother and a father, in order to develop appropriate gender-defined self identity. If he does not do so, severe individual problems will occur. The matter should be approached with great caution for the child has no voice in this matter and he may be unfortunately consigned to a pathological family setting from which he can not escape without serious psychological damage... The negative effect on children who are adopted into homosexual "family" structure can be profound. I believe that:

- (1) a normal environment provides a child with the opportunity to utilize his capacities in order to further the promotion of a sense of autonomy and identity, to enhance and affirm ego-boundaries between himself and other family members, and to promote a healthy self-esteem as a member of his own sex;
- (2) the parents' function is to promote the child's separation from the mother into an independent entity, all the while supplying physical and emotional security needs;
- (3) both mother and father are models for identification toward the assumption of appropriate sexual identity and sexual role in accordance with anatomy;
- (4) the alleviation of conflicts, especially those involving distortion of roles during the earliest years, help the child to channel his drives, energy, and role-learning in the proper direction...

The families of homosexual patients I have treated are markedly deficient in carrying out many of the functions necessary for the development of an integrated heterosexual child. Distorting influences are very profound in families in which the child is not helped to develop the appropriate gender-identity... The disturbance in gender-defined self-identity sets the stage for the development of all sexual deviations and many of the neurotic conditions.<sup>215</sup>

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214. Charles W. Socarides, M.D., "Roundtable on Homosexuality," 1994.

215. Charles W. Socarides, M.D. "Roundtable on Homosexuality," 1994.

## MINORITY OPINION

Not all marriages and families "work," but it is unwise to let pathology and failure, rather than a vision of what is normative and ideal, guide us in the development of social policy.

### 2. Homosexuality was Removed as a Pathology from the American Psychological Association in 1973 as a Result of Political, Not Medical or Psychological Considerations

The majority relies on the removal of homosexuality from the list of psychological disorders in 1973 to support its rejection of the overwhelming opposition to homosexual marital rights.<sup>216</sup> However, in 1973, homosexuality was removed from the category of aberrancy by the American Psychiatric Association as a direct result of relentless intimidation and pressure from gay rights group activists and mistaken beliefs by the few that they were doing a kindness to the homosexual community, although it was not based upon psychoanalytic knowledge of human sexual behavior and no new scientific or clinical findings gave credence to this political act.<sup>217</sup> The quoted and referenced materials in subsections 4. and 5. below, are subsequent to that de-listing, and validate the medical, scientific and psychoanalytic bases for maintaining homosexuality as a psychopathology.

According to Dr. Socarides, "The new position [in 1973] favoring deletion of homosexuality was obviously clinically untenable and scientifically fallacious, even to a first-year resident in psychiatry. There was no scientific explanation for this deletion except the statement that the homosexual did not experience 'suffering'; those who disliked being homosexual and 'suffered over it' or 'complained' were to be considered to have a 'disorder'."<sup>218</sup> He also writes:

Homosexuality is a psychiatric psychopathological condition. It is acquired, not innate, and is a consequence of a disturbed family constellation: an interaction between parents and their children, resulting in a certain abnormal and deviant sexual behavior. It can be treated or even cured when the patient is motivated to change by professionals who understand this condition and know how to treat it."<sup>219</sup>

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216. See, John Finnis, "Shameless Acts in Colorado: Abuse of Scholarship--in Constitutional Cases," *supra*.

217. Charles W. Socarides, M.D., "Sexual Politics and Scientific Logic: The Issue Of Homosexuality," *The Journal of Psychohistory*, 19(3), Winter, 1992, pg. 307. See also, Roger Magnuson, *Informed Answers to Gay Rights Questions*, Multnomah Books, 1994, pg. 74. See also, R. Bayer, *Homosexuality and American Psychiatry*, New York: Basic Books, 1981) pg. 102 ff. See also Charles W. Socarides, M.D., *Homosexuality A Freedom Too Far*, Adam Margrave Books, 1995, chapter six.

218. *Id.* at 312.

219. Charles W. Socarides, "Roundtable on Homosexuality" 1994.

Based upon this psychological nature of homosexuality, the state should not designate homosexual coupling as one of the alternatives for our society to choose from in the maturation process.

### 3. Homosexuality Is Still Listed In The International Diagnostics Manual As A Psychological Pathology

Although the American Psychiatric Association de-listed homosexuality as a psychological pathology in 1973 on political grounds, the World Health Organization still catalogues homosexuality as a disorder. The *International Classification of Diseases*, 9th Revision (ICD-9) published by the World Health Organization, contains a chapter on "Mental Disorders" including "Section 302, Sexual Deviations and Disorders." Section 302.0 deals with homosexual conflict disorder and lesbianism.<sup>220</sup>

Homosexuality is an abnormal condition caused by childhood experiences within the family and by personalities of the parents and the nature of the relationship. It is directly related to faulty psychological development of the child within his disturbed family.<sup>221</sup> It is not caused by biologic or genetic factors, but is clearly environmental in source.<sup>222</sup> The majority incorrectly states that the minority presumes that homosexuality is completely voluntary.<sup>223</sup> To the contrary, all the psychological and psychiatric evidence cited in this minority opinion

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220. *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death*, 9th Revision, World Health Organization, Geneva, Switzerland; Section 302 also deals with Section 302.1 entitled Zoophilia deals with bestiality; Section 302.2 entitled Pedophilia deals with sex with children; Section 302.3 entitled Transvestism; Section 302.4 entitled Exhibitionism; Section 302.5 entitled Trans-sexualism; Section 302.6 entitled Disorders of psychosexual identity dealing with feminism in boys and gender identity disorder of childhood; Section 302.7 entitled Psychosexual dysfunction dealing with psychosexual dysfunction, unspecified (302.70), with inhibited sexual desire (302.71), with inhibited sexual excitement (302.72), with inhibited female orgasm (302.73), with inhibited male orgasm (302.74), with premature ejaculation (302.75), with functional dyspareunia (302.76), and with other specified psychosexual dysfunctions (302.79). DO WE INTEND TO GRANT CIVIL RIGHTS ON THESE GROUNDS AS WELL? See the story of Martine Rothblatt, a lawyer who views the world without borders. She is legally married to her lesbian lover (the only ones in the U.S. because she used to be a man when she married her wife, and then after years of marriage the two decided it would be fun for them to spend the rest of their lives as lesbians. Martine received a sex change operation.) The story is a cover story to the *National Law Journal*, June 12, 1995.

221. Harold M. Voth, M.D., "The Family And the Future of America," *Alabama Journal of Medical Sciences*, Volume 15, Number 3, July 1978 page 310. Dr. Voth is the Senior Psychiatrist and Psychoanalyst at the Menninger Foundation, Topeka, Kansas, a Rear Admiral in the U.S. Naval Reserve and author of many articles published in professional journals.

222. See "Chromosomal Differences in Gays?", July-August 1993 issue of *Family Research Report of the Family Research Institute*, a nonprofit, educational and scientific corporation. See also "What Causes Homosexual Desire and Can It Be Changed?", Dr. Paul Cameron, Chairman, Family Research Institute, Inc., 1991.

223. See Chapter 6.B. of this report.

## MINORITY OPINION

evidences that the root of the compulsion to engage in homosexual acts lies in deep emotional disturbance.

Contrary to the majority citation to the 1994 work by Friedman and Downy for the proposition that the "jury is still out" concerning this issue, a biologic source for homosexuality has not been found. Several studies were conducted which neither proved the genetic basis for homosexuality, nor, more importantly, were replicated by peer review.<sup>224</sup>

The jury in scientific research is nothing like our criminal jury system where the defendant is innocent until proven guilty. The biologic base for homosexuality must be proved scientifically, and until it is, it is not scientific truth. On the other hand, the psychological basis has been proved for a hundred years. A 100% success rate is never expected with treatment of psychological disorders. On the other hand, a genetic base for a trait would result in a 100% occurrence rate, occasional recessive genes aside.

In any event, when some scientific evidence suggests a genetic predisposition for homosexual orientation, the case is not significantly different from evidence of predispositions toward other traits – for example, alcoholism or violence. In each instance we must still ask whether such a predisposition should be acted upon or whether it should be resisted.<sup>225</sup> Consequently, the failure of the Commission to discuss these issues when recommending homosexual marital rights is inexcusable.

#### 4. Mental Health Professionals Say that Homosexuals Can Change

Dr. Gerard van den Aardweg (Ph.D in psychology from University of Amsterdam; taught in universities in Netherlands and Brazil) writes:

...Indeed since relatively few homosexuals seriously try to change and few therapists encourage them to do so, the notion that homosexuality is irreversible is a self-fulfilling prophecy. If nobody tries, nobody will succeed....Why would we take a fatalistic attitude toward the possibilities of improvement of homosexuality when an acceptable percentage improves substantially?<sup>226</sup>

Dr. Ruth Tiffany Barnhouse (M.D. from Columbia University College of Physicians and Surgeons; clinical assistant psychiatrist at Harvard University; member of the Ethics Committee of the Massachusetts Psychiatric Society) writes:

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224. See, Cal Thomas, "The Gay Gene, Not-so-Straight News; 'Reporting on Genetic Research Tells Only Half the Story.'" *World*, Nov. 11, 1995, pg. 18, attached in Appendix F.

225. The Ramsey Colloquium, "The Homosexual Movement, A Response by the Ramsey Colloquium," *First Things*, March 1994.

226. *Homosexuality and Hope: A Psychologist Talks About Treatment and Change* (Ann Arbor, MI; Servant Books, 1986, pg. 107); see also the following, excerpted on Appendix G: *How To Be Your Own Best Friend* (New York: Lark Publishing Company, 1971, pgs. 22-23); *Comprehensive Group Psychotherapy*, edited by Harold I. Kaplan and Benjamin J. Saddock (Baltimore: The Williams

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

The frequent claim by "gay" activists that it is impossible for homosexuals to change their orientation is categorically untrue. Such a claim accuses scores of conscientious, responsible psychiatrists and psychologists of falsifying their data.<sup>227</sup>

Dr. Reuben Fine (Ph.D in clinical psychology from USC; Director of the New York Center for Psychoanalytic Training; visiting professor at Adelphi University) writes:

I have recently had occasion to review the results of psychotherapy with homosexuals, and been surprised by the findings. It is paradoxical that even though the politically active homosexual group denied the possibility of change, all studies from Schrenck-Notzing on have found positive effects, virtually regardless of the kind of treatment used... (p. 84)

Whether with hypnosis..., psychoanalysis of any variety, educative psychotherapy, behavior therapy, and/or simple educational procedures, a considerable percentage of overt homosexuals became heterosexual.... If the patients were motivated, whatever procedure is adopted a large percentage will give up their homosexuality. In this connection public information is of the greatest importance. The misinformation spread by certain circles that "homosexuality is untreatable by psychotherapy" does incalculable harm to thousands of men and women. (Pgs. 85-86.)<sup>228</sup>

Dr. Robert Kronmeyer (studied at Amherst College; Ph.D. in Psychology from Columbia University; served as Adjunct Professor at New York University; developed Syntonix Therapy) writes:

With rare exceptions, homosexuality is neither inherited nor the result of some glandular disturbance or the scrambling of genes or chromosomes. Homosexuals are made, not born "that way." From my 25 years' experience as a clinical psychologist, I firmly believe that homosexuality is a learned response to early

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and Wilkins Company, 1971, pg. 521); Dr. Charles Socarides, "Homosexuality," *American Handbook of Psychiatry*, 2nd edition, Vol. 3 (New York: Basic Books, Inc., 1974, pg. 308); Samuel B. Hadden, "Treatment of Male Homosexuals in Groups," *The International Journal of Group Psychotherapy*, XVI, No.1 (January 1966, pg. 14); "A Way Out for Homosexuals," *Harper's Magazine* (March 1967, pg. 107); *Changing Homosexuality in the Male* (New York: McGraw-Hill Book Company, 1970); *The Primal Scream* (New York: Dell Publishing Company, 1970); Father John F. Harvey, *The Homosexual Person: New Thinking in Pastoral Care* (San Francisco: Ignatius Press, 1987, pg. 76); "Homosexuality and Sexual Orientation Disturbances," *Comprehensive Textbook of Psychiatry II*, second edition, edited by Alfred M. Freedman, Harold I. Kaplan, and Benjamin J. Sadock (Baltimore: The Williams & Wilkins Company, 1975, pg. 1519); *Homosexuality in Perspective* (Boston: Little, Brown 251); *Homosexuality* (New York: Jason Aronson, 1978); *What You Should Know About Homosexuality*, edited by Charles W. Keysor (Grand Rapids: Zondervan Publishing House, 1979, pg. 167).

227. "What Is a Christian View of Homosexuality?", *Circuit Rider*, February, 1984, pg. 12.

228. "Psychoanalytic Theory," *Male and Female Homosexuality: Psychological Approaches* (Washington, D.C.: Hemisphere Publishing Corporation, a subsidiary of Harper and Row Publishers, Inc., 1987).

## MINORITY OPINION

painful experiences and that it can be unlearned. For those homosexuals who are unhappy with their life and find effective therapy, it is 'curable.'<sup>229</sup>

And finally:

Treatment using dynamic individual psychotherapy, group therapy, aversion therapy, or psychotherapy with an integration of Christian principles will produce object-choice reorientation and successful heterosexual relationships in a high percentage of persons.... Homosexuals can change their orientation.

*What You Should Know About Homosexuality*, edited by Charles W. Keysor (Grand Rapids: Zondervan Publishing House, 1979, pg. 167).

### 5. Studies Show That Homosexuality Can Be Cured By Psychoanalysis.<sup>230</sup>

Houston MacIntosh, M.D., reporting a recent survey of 285 psychoanalysts who had analyzed 1215 patients found that:

\*23% of their patients changed to heterosexuality;

\*84% received significant therapeutic benefit.

This cure rate is comparable to the 27% cure rate reported by Bieber in 1962.<sup>231</sup> In addition, the recent *NARTH Bulletin* (September 1994) reported:

A review of the literature from the past reveals an interesting tidbit from behavioral psychologist Joseph Wolpe. Wolpe once reported an unexpected cure in a case of homosexuality. No--not with electric prods or lobotomy. In fact, his original therapeutic goal was to reinforce and affirm the 32-year-old patient's homosexual orientation and desensitize his Catholic guilt. This strategy, Wolpe

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229. *Overcoming Homosexuality* (New York: Macmillan Publishing Company, Inc. 1980, pg. 7).

230. See Appendix F for list of quotes from the following publications:

Ruth Tiffany Barnhouse, *Homosexuality: A Symbolic Confusion* (New York: The Seabury Press, 1977, pg. 97); Dr. Irving Bieber, *Homosexuality: A Psychoanalytic Study* (New York: Basic Books, 1962, pg. 301); Charles W. Socarides, M.D. *Homosexuality* (New York: Jason Aronson, 1978, pg. 405-406.); Morey, Tom, Committee to Study Homosexuality of the United Methodist Church, General Conference of Ministries, Chicago Meeting on the Sciences, August 1990, p.19.; Robert Kronmeyer, *Overcoming Homosexuality* (New York: Macmillan Publishing Company, Inc., 1980, pg. 135); Dr. Toby Bieber, "Group Therapy with Homosexuals," *Comprehensive Group Psychotherapy* edited by Harold I. Kaplan and Benjamin J. Saddock (Baltimore: The Williams and Wilkins Company, 1971.); E. Mansell Pattison and Myrna Loy Pattison, " 'Ex-Gays': Religiously Mediated Change in Homosexuals," *American Journal of Psychiatry* (December 1980); Gerald van den Aardweg, *Homosexuality and Hope: A Psychologist Talks About Treatment and Change* (Ann Arbor, MI: Servant Books, 1986.); *Homosexuality: Disease or Way of Life* (New York: Collier Books, 1962).

231. Houston MacIntosh, M.D., wrote in "Attitudes and Experiences of Psychoanalysts in Analyzing Homosexual Patients," *Journal of the American Psychoanalytic Association* (Vol. 42, No. 4, pgs. 1183-1207).

later explained, was due to his belief at the time that homosexuality was biologically determined.

To the surprise of both the patient and Wolpe, the man gave up his homosexual lifestyle and relationship and began to date women. Wolpe explained this spontaneous reversal as a consequence of the patient's feeling more socially assertive, independent and accepted by men for the first time in his life. Four years later, a follow-up showed that the patient had gotten married, was reporting a very satisfactory sex life, and his wife was expecting a baby.<sup>232</sup>

**F. The Majority of Commissioners Refused to Discuss the Necessity for a Very Broad Religious Freedom Exemption Covering Religious Institutions and Individuals Who have Religiously Motivated Objections to Accepting Homosexual Couples as Marriage-equivalents<sup>233</sup>**

Many of the people who testified before the Commission expressed opposition to homosexual marital rights on the basis of their religious beliefs.<sup>234</sup> The majority dismisses all of these arguments based on an extreme view of the doctrine of separation of church and state.<sup>235</sup> This view has, as recently as 1986, been rejected by the U.S. Supreme Court. In upholding criminal punishment for sodomy in Georgia, the Supreme Court relied on "the millennia of moral teaching" in opposition to homosexuality.<sup>236</sup> Clearly, in Hawaii, our common law restricting same-sex couples from marrying reflects that same moral teaching. In addition, looking to the sometimes-cited ancient Hawaiian cultural view of homosexuality in reference to the Aikane and the Mahu, cannot support same-sex marriage in light of the fact that before going to war, the Hawaiians would purge all the Mahus, including in many instances, killing them. Abandoning such Hawaiian traditions was a great improvement in Hawaiian society.

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232. Dr. Joseph Wolpe, *The Practice of Behavior Therapy* (Pergamon Press, 1969, pg 255-262). *NARTH Bulletin* (September 1994).

233. See Richard Duncan letter of October 9, 1995 and his article in *69 Notre Dame Law Review* 393 (1994).

234. The following churches or denominations expressed such opposition: The Roman Catholic Church of the State of Hawaii; The Charismatic Episcopal Church of North America Christian Voice Hawaii; Hawaii Association of Evangelicals; Christians for Responsible Leadership; Kalihi Union Church; Oahu Christian Center and the Great Commission Fellowship as well as other individual members of the public who spoke in opposition based on their religious beliefs. See Minutes of October 11, 1995.

235. This is not surprising in light of the fact that Tom Gill, the Commission Chairman, is listed as a member of the Board of Directors of the A.C.L.U. of Hawaii, on a press release dated October 27, 1993, announcing the formation of a coalition to support same-sex marriage in Hawaii. See Appendix F attached.

236. *Bowers v. Hardwick*, 478 U.S. 186 (1986) reh. denied, 478 U.S. 1039 (1986).

## MINORITY OPINION

The majority also find that no one should "impose" his religious or moral views on others. Yet, that is precisely what the majority seeks to do with homosexual marital rights to more than two-thirds of the Hawaii population for the benefit of some portion of 2% of the population. The majority goes so far as to report in Chapter 2, section D, page 33, of the draft of the report that the religious groups opposed to homosexual marriage will be able to refuse to solemnize homosexual marriages, but that the pressure which will be exerted on these traditional religious people and their churches will force them to abandon their religious objections to homosexuality.<sup>237</sup> It is for exactly these reasons that the religious exemption must be as broad and sweeping as possible.

Richard Duncan, Esq., Constitutional Law Professor, University of Nebraska, College of Law, desired to discuss the critical need for a religious exemption via telephone with the Commission. He was not permitted; however, he did send written suggestions to adopt a very broad religious exemption. Even Dan Foley, Esq., the lawyer for the Plaintiffs in *Baehr*, supports a religious exemption.

If homosexual marital rights are recognized in Hawaii, either in the form of domestic partnership, homosexual marriage, or otherwise, a very broad religious exemption is necessary for many reasons. Parents of public school students, teachers in the public schools, people who are licensed to solemnize marriages, owners of rental housing, and employers who object to homosexual marriage rights on religious grounds should be protected from government forced acknowledgement of homosexual marriage rights.

One of the serious consequences of including homosexual coupling in the marital partnership will occur in the public school setting. If homosexual coupling is acknowledged on the same level with heterosexual marriage, the public schools will be forced to teach children that homosexual coupling is equivalent to marriage. Since as many as two-thirds of the people polled in Hawaii do not support homosexual marriage rights,<sup>238</sup> it is safe to assume that a great majority of parents and teachers also do not agree with homosexual marriage rights.

Public anxiety about homosexuality is preeminently a concern about the vulnerabilities of the young. This, we are persuaded, is a legitimate and urgent public concern.<sup>239</sup>

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237. When this statement appeared in the Minority Opinion, the majority dropped the phrase related to pressuring traditional religious people to abandon their religious objections.

238. See "Five Hawaii Polls on Legalizing Same-Sex 'Marriage'" attached in Appendix G.

239. The Ramsey Colloquium, "The Homosexual Movement, A Response by the Ramsey Colloquium," *First Things*, March 1994.

REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW

Indeed, we do not think it a bad thing that people should experience a reflexive recoil from what is wrong. To achieve such a recoil is precisely the point of moral education of the young.<sup>240</sup>

Those parents who on religious grounds object to the school teaching their children that homosexual coupling is equivalent to heterosexual marriage, must be given the express statutory right to remove their children from such school lessons. However, the difficulty in enforcing such a right counsels the legislature to prohibit such teaching in any public school by teachers or invited speakers. The ongoing dispute in Pahoia concerning Project 10 is a prime example. One parent from Pahoia testified before the Commission that she was greatly concerned by the possibility of homosexual marital rights specifically because of the negative impact on her community's fight to keep Project 10 out of their schools.<sup>241</sup>

Teachers who, for religious reasons, do not desire to teach that homosexual coupling is on par with heterosexual marriage must be protected by express statutory provisions as well. Their religious freedom must be protected by specifically creating in the homosexual marriage rights legislation their freedom to oppose the teaching of homosexual marriage rights as equivalent to heterosexual marriage. At least one of the Commissioners, Morgan Britt, desires to ensure that schools are forced to teach, and children forced to learn, that homosexuality and heterosexuality are equivalent.

Any legislation creating homosexual marriage rights must expressly state that no person shall be subject to fine, loss of license, liability for damages, or other punishment or penalty for rejecting homosexual marriage rights on religious grounds.

In addition, religious people who are authorized to solemnize marriages based upon licensing from the State Health Department must not be required to solemnize homosexual couples, and must not be in any manner punished for refusing to do so. The legislation creating homosexual marriage rights must expressly state that no person licensed to solemnize marriages in Hawaii shall be subject to fine, loss of license, liability for damages, or other punishment or penalty for rejecting homosexual marriage rights on religious grounds.

Furthermore, people who on grounds of religious belief oppose homosexual coupling must not in any manner be forced to acknowledge homosexual coupling, either as a landlord renting a house or apartment, as an employer extending spousal benefits, or otherwise. The legislation creating homosexual marriage rights must expressly state that no person shall be subject to fine, liability for damages, or other punishment or penalty for rejecting homosexual marriage rights on religious grounds.

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240. *Id.*

241. See Minutes of November 8, 1995, for testimony of Diane Sutton. See also correspondence from Diane Sutton, both attached in Appendix I.

## MINORITY OPINION

The religious freedom of the U.S. Constitution and the Constitution of the State of Hawaii must be fully protected in the event homosexual couples are extended any marriage benefits.

### VI. The Majority of the Commissioners were Biased in Favor of Homosexuality and the Desires of the Homosexual Community

The results reached by the majority of the Commission were long anticipated even before the first meeting. Each successive meeting reinforced the expectation that the majority would demand homosexual marriage rights in order to assist the plaintiffs in the *Baehr v. Miike* litigation.

#### A. Prior to Conducting the First Meeting, the Commissioners were Provided with Proposed Legislation Creating Domestic Partnerships in the State of Hawaii

Prior to the first meeting, Chairman Gill provided the Commissioners with a packet of materials. His memorandum accompanying the materials indicated that they were being furnished "so that we can familiarize ourselves with some of the issues and points of view we will need to consider."<sup>242</sup> The materials concerning the "issues and points of view" consisted of fully drafted, proposed legislation creating domestic partnerships in the State of Hawaii; three separate, legally comprehensive articles advocating domestic partnerships and/or same sex marriage;<sup>243</sup> and two short articles (collectively encompassing three pages) containing information opposing the legalization of such relationships--a two-page religious dissertation, void of any legal arguments whatsoever<sup>244</sup> and a one-page article opposing government recognition of homosexual relationships which had been published in the February 1995 *Hawaii Bar Journal*.<sup>245</sup> In other words, the materials offered for review and consideration by the Commissioners were facially unbalanced and prejudicial from the outset. The fully drafted proposed legislation was provided as a starting point for discussion and negotiation because the make-up of the Commission ensured a recommendation of homosexual marital rights of some kind.

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242. Memorandum to Members, Commission on Sexual Orientation and the Law from Thomas P. Gill, Chairman, dated August 31, 1995, attached in Appendix H.

243. August 1995 Special Report of the Spectrum Institute "Legalization of Same-Sex Marriage is Sure Bet in Hawaii--Or is it?"; the New Mexico "gender neutral" marriage law (N.M. Stat. Ann. Sec. 40.1.1) with subsequent sections and annotations; Special Report, Spectrum Institute "An Analysis of Domestic Partnership Ordinances in Existence; and Proposed Draft Legislation for a Domestic Partnership Law in Hawaii.

244. Woodward, C.F., Evangelist, "God's Way," unsolicited, undated statement received by Chairman Thomas Gill.

245. Dunn, Sandra, "Same Sex Marriage," *Hawaii Bar Journal*, February, 1995.

**B. The Majority of Commissioners Opposed and Deliberately Thwarted any Discussion of Homosexuality in Connection with the Work of the Commission**

At the first meeting on September 13, 1995, the majority agreed that no discussion of homosexuality should be permitted in connection with the Commission's work since the majority found any such discussion inflammatory or offensive. Specifically, Commissioner Stauffer recommended that because he believed there is no reason to discriminate against someone on the basis of their sexual orientation, the Commission should prohibit any discussion or testimony addressing homosexuality and concentrate its efforts solely on legal and economic issues. The other members of the majority agreed that discussion concerning homosexuality was generally offensive.<sup>246</sup> However, the two minority Commissioners raised the issue of how the Commission could perform the legislative charge to examine policy issues without discussing homosexuality. They also raised First Amendment freedom of speech rights, and the discussion culminated in no formal resolution or motions being made.<sup>247</sup>

Also, at the first meeting on September 13, 1995, Mr. Jonathan C. Cuneo and Ms. Karyn Tiedeman of He Kanaka Hou attempted to testify before the Commission<sup>248</sup> concerning their respective personal experience of being healed from homosexuality. Mr. Cuneo testified first, introducing himself as the Executive Director of He Kanaka Hou. Commissioner Gomes interrupted him and ridiculed him for mispronouncing the Hawaiian name of his organization. When Ms. Tiedeman began testifying, she attempted to obtain the correct pronunciation from Commissioner Gomes, but her efforts were met with rude disdain. In addition, these speakers had provided the Commissioners with handouts concerning their organization which counsels homosexuals who seek to come out of that lifestyle. As they were leaving, Commissioner Gomes was observed literally shoving the handouts back into their hands.

At the October 11, 1995 meeting, the majority of the Commissioners refused to receive expert testimony via telephone from Joseph Nicolosi, Ph.D. concerning his long use of reparative therapy in successfully treating homosexuals through psychoanalysis. Also on October 11, 1995, Loree Johnson, a mother and grandmother, testified before the Commission in opposition to homosexual marital rights. In her personal testimony as a member of the public, she characterized homosexual activity as "repugnant, disgusting, self-indulgent, exploitative, addictive, and dangerous."<sup>249</sup> Commissioner Morgan Britt interrupted

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246. See Minutes of September 27, 1995.

247. See Minutes of September 13, 1995, at 4.

248. See Minutes of September 13, 1995.

249. See Minutes of October 11, 1995 for testimony of Loree Johnson.

## MINORITY OPINION

Ms. Johnson's testimony at least twice, demanding that she not be permitted to continue because he found her testimony offensive.

At the November 1, 1995 continuation of the October 25, 1995 regularly held meeting, a member of the public wearing a priest's collar attended and requested five minutes to testify. The person indicated that he could not return at the next scheduled meeting on November 8, 1995, and this would be his only opportunity to testify. Chairman Gill refused to permit his testimony.<sup>250</sup>

At the November 8, 1995, meeting, Mrs. Diane Sutton, a resident from the Big Island, attended the meeting and testified.<sup>251</sup> Mrs. Sutton presented testimony concerning the adverse effect of same sex-marriage on public policy from the public school curricula and misleading of adolescents concerning the homosexual lifestyle.<sup>252</sup> Commissioner Morgan Britt interrupted Mrs. Sutton, virtually shouting his objections to her being permitted to present the matters in her testimony. Commissioner Britt's conduct was so disruptive that Mrs. Sutton actually skipped a portion of her written testimony. Indeed, at one point Commissioner Britt described Mrs. Sutton's testimony as factually inaccurate. Mrs. Sutton was literally stopped from speaking due to Commissioner Britt's harassment. Mrs. Sutton was so outraged by her treatment that she subsequently wrote to the Commission to formally complain of her treatment as a member of the public and what she perceived to be Mr. Britt's inference that she was a liar.<sup>253</sup>

Ms. Loree Johnson again attempted to present public testimony at the November 8, 1995 meeting, and was again rudely interrupted by Commissioner Britt with the assistance of Commissioner Gomes. So disruptive were these Commissioners' vocalized objections to Ms. Johnson's testimony that she was forced to bring her testimony to an abrupt close.<sup>254</sup>

### **C. The Official Record of the Meetings Failed to Accurately Reflect the Content of the Meetings, and the Majority of the Commissioners Voted Down Attempts to**

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250. See Minutes of October 25, 1995.

251. See Minutes of November 8, 1995.

252. See Minutes of November 8, 1995, for testimony of Diane Sutton dated November 7, 1995, attached in Appendix I.

253. See Minutes of November 8, 1995 and letter from Diane Sutton to Chairman and All Commissioners dated November 9, 1995, attached in Appendix I.

254. See Minutes of November 8, 1995.

### **Have the Record Correctly Reflect What Actually Occurred at the Meetings**

At the first meeting, Commissioner Hochberg moved to have a licensed court reporter transcribe the meeting if he could find one who would volunteer to provide the services without cost to the State, and have transcripts prepared within the Commission's time limits. The motion failed 2-4.<sup>255</sup>

Although Commissioner Hochberg brought a formal motion to correct the Minutes of the September 13, 1995, to accurately reflect the opinions of the guests who testified in opposition to homosexual marital rights, the majority voted against the motion, refusing to permit the Minutes--the official record of the Commission's work--to accurately reflect what actually occurred at the meeting.<sup>256</sup>

At the September 27, 1995 meeting, Commissioner Hochberg brought several motions in an attempt to amend the proposed September 13, 1995 record to accurately reflect what occurred at the meeting. The most significant of those motions include the following:

1. First, Commissioner Hochberg sought to have the minutes of the first meeting (September 13, 1995) accurately reflect the Commission's deliberation concerning discussion of homosexuality. Nevertheless, Commissioner Hochberg's motion failed 2-4, effectively destroying the credibility of the September 13, 1995 minutes.

2. At the October 26 session which was a continuation of the October 25, 1995 meeting, the Chairman refused to permit discussion of proposed corrections to the October 11, 1995 minutes and insisted that the meeting proceed without approving the record of the hotly debated prior meeting of economists.

3. Significantly, at the October 11, 1995 meeting, both economists testified. From the time the dispute arose over how the record would reflect the economists' testimony, up to the time of writing the draft of this report November 24, 1995, no record of the Commission's actions was made although minutes of these meetings are cited and even quoted throughout the majority report.

#### **D. The Majority of the Commissioners Consistently Voted in a Block to Thwart the Attempts of the Two Other Commissioners To Insist That the Commission**

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255. See Minutes of September 13, 1995.

256. See Minutes of September 27, 1995.

## MINORITY OPINION

### Conduct its Work in a Fair and Balanced Manner

As discussed above in this minority opinion, the first meeting on September 13, 1995, the LRB attorney informed the Commissioners that she had compiled the LRB List based on the definition of legal benefits in Act 217. The Commissioners then discussed the legislative modification set out in Act 5, but no working definition of "major" legal and economic benefit was determined.

At the next meeting on September 27, 1995, Commissioner Hochberg moved that the Commission adopt a definition of "major legal and economic benefits". Chairman Gill ruled Commissioner Hochberg out of order. The Chairman, supported by the usual majority of the Commissioners, refused to entertain Commissioner Hochberg's motion. Commissioner Hochberg renewed his motion concerning a working definition of "major legal and economic benefits" at the end of the meeting. The motion failed 2-4.<sup>257</sup>

Despite repeated attempts by Commissioner Sheldon to bring motions to the floor concerning: (1) neighbor island participation; (2) the credentials of the alleged expert whose work Commissioner Stauffer primarily relied on for his proposed "findings of the Commission"; (3) the Chairman's responses to Commissioner Sheldon's specific concerns regarding the manner in which the Commission was proceeding with its work; (4) the review and approval of the Minutes of October 11, 1995; and the (5) adoption of *Robert's Rules of Order* for the conduct of Commission meetings, the Chairman consistently refused to entertain any of Commissioner Sheldon's motions until Commissioner Stauffer finally suggested to the Chairman on November 2, 1995 that Commissioner Sheldon's motions should be addressed. Each of the above-referenced motions failed, by a vote of 2-4 or 2-3 with one abstention. The Chairman did not vote as a general rule, and when he did vote, it was always with the majority which advocates special rights for homosexual couples.

While the failure to pass the above motions evidences the imbalance on the Commission, the refusal by the majority to undertake to travel to the neighboring islands is especially significant since those citizens living on those islands who cannot afford to travel to Oahu were deprived of their right to participate in the process.

See the letters between Chairman Gill, Commissioner Hochberg and Commissioner Sheldon attached hereto as Appendix H.

- E. In His Quest to Submit a Report to the Legislature, the Chairman Selectively Stifled Substantive Discussion and Demanded that the Commission Vote on Crucial Matters Before the Record of Meetings Containing Indispensable Expert**

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257. See Minutes of September 27, 1995.

**Testimony Were Corrected and/or Approved**

On October 9, 1995, two days before the third regularly scheduled Commission meeting, the Chairman dispatched a memorandum to all Commissioners with a "Resolution of the Commission on Sexual Orientation and the Law" attached.<sup>258</sup> The resolution proposed that the Commission adopt the statutes on the LRB List as the major legal and economic benefits extended to married opposite-sex couples.<sup>259</sup> The next day, October 10, 1995, Commissioner Hochberg wrote to Chairman Gill with copies to all Commissioners expressing his concerns that the list Chairman Gill sought to adopt had not been discussed or analyzed, but was based on work done by the previous Commission which was operating under different instructions than the present Commission.<sup>260</sup> Commissioner Sheldon delivered a similar letter at the October 11, 1995 meeting.<sup>261</sup> TV and print reporters attended the October 11, 1995 meeting and as a result, voting on this resolution was delayed.

The October 25, 1995 meeting began with a review of the Minutes of October 11, 1995. Commissioner Stauffer presented a one-page list of his proposed amendments which was distributed to the Commissioners at the meeting. Chairman Gill insisted that the Commission vote on these proposed changes with little opportunity to actually review them, and without any discussion. Thereafter, Chairman Gill refused to entertain any oral corrections proposed by Commissioner Hochberg, and required that Commissioner Hochberg submit his proposed changes to the minutes in writing for consideration at a later time.<sup>262</sup>

Thereafter, the Chairman proceeded with the guest speaker portion of the meeting. The Commission heard from three speakers regarding public policy implications and concerns associated with extending benefits to same-sex couples. Among those professionals was Thomas F. Coleman of the Spectrum Institute. Mr. Coleman stated that he is homosexual. He purported to be a legal expert on sexual orientation and marital status discrimination, the definition of family, and domestic partnership issues.<sup>263</sup> Mr. Coleman was afforded uninterrupted, virtually *carte blanche* time to deliver his presentation which included visual aids. Commissioner Hochberg inquired of Mr. Coleman for information concerning the "Spectrum Institute" because Mr. Hochberg's research indicated that Spectrum Institute was

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258. See Memorandum to Commission Members from Thomas P. Gill, Chairperson, Re Decision Making, October 11 Meeting, dated October 9, 1995, attached in Appendix H.

259. *Id.*

260. See letter attached in Appendix H.

261. See letter attached in Appendix H.

262. Commissioner Hochberg complied with the Chairman's request for written corrections to the minutes of the economists' testimony. Nonetheless, the Chairman refused to consider them over the minority's vigorous objection.

263. See letter from Thomas F. Coleman to Hon. Tom Gill dated September 26, 1995.

MINORITY OPINION

really the alter-ego of Mr. Coleman.<sup>264</sup> At the conclusion of Mr. Coleman's presentation, Chairman Gill asked Mr. Coleman to provide the Commission with a draft comprehensive domestic partnership legislation. He has done so.

Another invited expert at the October 25, 1995 meeting, Fritz Rohlifing, Esq., was not given the opportunity to fully present his opposition to homosexual marital rights. He was rudely rushed to finish by the Chairman without objection from the majority.<sup>265</sup> The majority simply did not desire to hear testimony with which they disagreed.

When the October 25, 1995 meeting reconvened on October 26, 1995, Chairman Gill announced that the Commission would finish its report by the end of November "come hell or high water". He then refused to permit the Commission to resolve the disputed record of the economists' testimony October 11, 1995 testimony. The majority upheld the Chairman's position by a vote of 5-2. Moreover, the Chairman rudely chastised Commissioner Hochberg, forbid him to put any motions on the table, stifled his attempts at discussion and continuously demeaned his efforts to make a viable contribution to the Commission's work. Indeed, at the close of this session, Chairman Gill inquired as to whether Commissioner Hochberg would "gas everybody next week to stop the proceedings".<sup>266</sup>

The Chairman's attitude and insistence that we forge ahead was particularly disconcerting because the October 11, 1995 Minutes and Commissioner Hochberg's written but unreviewed suggested corrections thereto concerned the testimony of expert economists. That testimony is crucial to the Commission's consideration of Commissioner Stauffer's proposed report sections which Chairman Gill insisted the Commission vote on beginning at the October 26 session. As a result of the Chairman's actions, which were unopposed by the majority of the Commissioners, the Commission proceeded to vote on the substantive content of those portions of the report dealing with "major legal and economic benefits" without any recourse to the minutes which contained the very essence of the information required to

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264. Computer databases and traditional print sources were searched for information on Spectrum Institute and Thomas F. Coleman. Looking to see if there have been published books or journal articles under either name, *Books in Print*, *Reader's Guide to Periodical Literature*, and computer databases on Westlaw and the Legal Infotrack CD-ROM at the Supreme Court Law Library were searched. No listings with either name as an author were found. The only listing found was Thomas F. Coleman as a subject; *The Los Angeles Daily Journal* published an interview with Coleman (39 column inches) in the September 21, 1981 issue. The last 10 years of the *San Francisco Chronicle* and the *Los Angeles Times* indexes were searched but not a single reference to either name was found. Traditional directories at the State Library were searched to find a descriptive listing of Spectrum Institute. There was no listing found at all in publications like *Encyclopedia of Associations* and directories of foundations, non-profit organizations, and educational organizations.

265. Mr. Rohlifing was also a Commissioner under Act 217, Session Laws of Hawaii 1994, representing the Church of Jesus Christ of Latter Day Saints.

266. The significance of these and other matters concerns the manner in which the Commission purported to address the tasks before it is fully documented in Commissioner Sheldon's October 27, 1995 letter to Chairman Gill which was copied to all Commissioners and which discusses with particularity monumental concerns regarding the manner in which the

reach a fair and honest conclusion concerning such alleged benefits.<sup>267</sup> The majority report cites and quotes from these minutes although at the time those portions of the majority report were written, the Commission did not have the minutes to cite or quote.

Chairman Gill permitted no business to take place at that meeting other than considering the draft report containing Commissioner Stauffer's proposed Commission findings regarding "major legal and economic benefits" as interpreted by Commissioner Stauffer's definition which he calls "Terminology". In essence, through the forced vote on Commissioner Stauffer's First Memo representing a portion of the ultimate Commission Report, the majority adopted Commissioner Stauffer's "Terminology" as the definition of "major" legal and economic benefit long sought by the minority. As discussed above, this "Terminology" essentially exchanged the Legislature's language of "major" for the Hawaii Supreme Court's language of "salient" as used in the *Baier v. Lewin* decision rendered two years before the legislation establishing this Commission was crafted.<sup>268</sup> This is interesting in that Commissioner Stauffer's "Terminology" was, for all intents and purposes, "railroaded" through as a definition under another name while Commissioner Hochberg's efforts to discuss and arrive at a definition were ridiculed, found out of order and banished from discussion.

The October 25, 1995 meeting was continued in various sessions through November 6, 1995. During that time, although Commissioner Hochberg sought to include in the draft report opposing viewpoints, Chairman Gill demanded that opposing information not be addressed until after Commissioners Stauffer and Britt's material were completed on behalf of the majority. The minority has never been given that opportunity except in writing this minority opinion.

Virtually none of the matters covered by either Commissioner Stauffer's proposed findings concerning "major" or "salient" legal and economic benefits or Commissioner Britt's proposed findings concerning "substantial public policy reasons" to extend benefits to homosexuals were discussed in any form whatsoever before the so called "findings" were drafted. Moreover, discussion concerning those "findings" was severely limited by the Chairman once the associated motions were placed on the floor. Nevertheless, the imaginary "findings of the Commission" as determined by Commissioners Stauffer and Britt were forced to a vote and passed 4-2 with little or most often no changes from their submitted form. This was the case even where the "findings" were facially erroneous and/or legally incorrect.

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Commission was proceeding. Attached in Appendix H. See also Chairman Gill's letter to Marie A. Sheldon, Esq. dated October 31, 1995 which purports to answer Ms. Sheldon's October 27, 1995 inquires.

267. *Id.*

268. See letter from Marie A. Sheldon to Thomas P. Gill, Esq., dated October 27, 1995, in Appendix H.

## MINORITY OPINION

### VII. Recommendations to Legislature

A. In light of the damage done to the Attorney General's ability to win the *Baehr* litigation as a result of the recommendations of the majority, the legislature should adopt a Constitutional Amendment preserving marriage and the marital partnership as between one man and one woman as husband and wife.

B. The legal and economic benefits conferred on married couples in the State of Hawaii should not be extended to homosexual and/or "common law marriage" couples without determining the cost of doing so.

C. The legal and economic benefits conferred on married couples in the State of Hawaii should not be extended to homosexual and/or "common law marriage" couples in order to preserve and protect children, families, and society because homosexuality is a psychological pathology and should not be encouraged or equated with heterosexuality.

D. Rather than legalize homosexual marriage or domestic partnership, or otherwise adopt a broad extension of derivative rights to homosexual couples, the State should identify specific, particular rights which might be extended to homosexual couples without undermining the institution of heterosexual marriage or imposing unreasonable costs upon the State. To make that determination, further study is necessary because this Commission failed to undertake that kind of examination. It may be that defining "family" to include "all persons who share a household" in some statutes would provide fair and appropriate protection without undermining the basic unit of society or imposing inordinate risks on children and marriage.

E. The legislature must create a very broad religious freedom exemption covering religious institutions and individuals who have religiously motivated objections to treating same-sex partnerships as marriage-equivalents.

## **Chapter 6**

### **MAJORITY RESPONSE TO MINORITY OPINION**

#### **I. Introduction**

Because of the strict time limitations on the Commissions' work and the obvious differences between the majority and the two minority members, it became obvious that there would be two opinions: one of the majority of the Commissioners and one for the minority. The minority members invited witnesses, participated in the examination of all witnesses, introduced copious amounts of material in support of their position, and participated at great length in the discussion of items proposed by the majority to be included in the report. Since the minority's basic position was that the Commission should "do nothing" which would extend any marital rights and obligations to same-gender couples, the Chair suggested, and the majority agreed, that the minority should prepare their own chapter without input or interference from the majority.

However, the majority reserved the right to comment on the basic points raised in the minority opinion and point out any errors or misrepresentations. That is the purpose of this Response.

#### **II. Majority Comment on Points Raised**

##### **A. The Underlying Position of the Minority is Based on the Religious Doctrine of Certain Churches or Groups**

Many minority witnesses, and their testimony made it clear, consider homosexual marriage immoral and completely unacceptable under their religious doctrines or beliefs.

However, testimony and written statements from various Christian churches and Buddhist groups made it clear that the minority position was by no means universal in the religious community.

The basic position of the minority then becomes that their religious-based position should determine the marriage law of the State of Hawaii, regardless of other religious beliefs or the civil rights of the individuals involved.

This is, of course, unacceptable to the majority, which seeks to protect the right of every church or religious group to believe and preach as they wish. But such groups have no right under our constitution to impose their beliefs on others through state law.

**B. The "Moral" Position of the Minority is Based on the Presumption that Homosexuality is Completely Voluntary on the Part of the Individuals Involved and Therefore They are Intentionally Committing an "Immoral" Act and Should be Sanctioned**

The minority opinion quotes selectively and at great length, from various sources in Section E of the minority opinion, which supposedly upholds its position. However, reading the statements selected is instructive: many of them point out that psychological "treatment" fails about as often as it succeeds. See particularly pages 82 and 83 of chapter 5 and quotes in Appendix F from one of the minority's main authorities, Dr. Socarides, which claims success with "nearly fifty percent." See also Dr. Hatterer in Appendix F where he states that he, over a period of years, treated some two hundred homosexual patients and of this group "...forty-nine patients recovered, nineteen partially recovered, seventy-six remained homosexual."

So what happens to the roughly half who do not "recover"? Are their actions purely "voluntary," and therefore "immoral"?

An article in the New England Journal of Medicine, published on October 6, 1994, and written by Richard Friedman, M.D. and Jennifer Downey, M.D.,<sup>269</sup> discusses the multitude of issues resulting from, and the possible causes of, homosexuality at length and from an objective viewpoint. They state on page 926: "the origins of sexual orientation appear to be multifactorial and diverse." On page 928 the authors state:

Preliminary evidence suggests that to some extent sexual orientation is influenced by biological factors, although the intermediate mechanisms remain to be described.<sup>270</sup>

The minority does not cite opposing view points in the psychological literature or the official positions of the professional associations that do not mesh with their position.<sup>271</sup> In assessing the credibility of the "experts" cited and quoted by the minority, the majority noted that both the American Psychological Association and the American Psychiatric Association hold different or opposite positions (see Appendix F). It should also be noted that one of the minority's most important "experts," Paul Cameron, has been expelled from the American

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269. Friedman, Richard and Jennifer Downey. "Homosexuality," New England Journal of Medicine, October 6, 1994, Vol. 331, No.14, pgs. 923-930. Excerpts of the article appear in Appendix F.

270. *Id.*

271. "...The American Psychiatric Association, since 1973 and the American Psychological Association has been on record since 1975 that "homosexuality per se implies no impairment of judgment, stability, reliability, or general social and vocational capabilities;" APA Policy Statements on Lesbian and Gay Issues, Committee on Lesbian and Gay Concerns, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

## MAJORITY RESPONSE TO MINORITY OPINION

Psychological Association.<sup>272</sup> The minority claims that the contrary position taken by the American Psychiatric Association was based on "political grounds" (minority opinion of this report, page 79). This might be called "symptomatic"--to borrow a phrase of the minority in claims of abuse and mistreatment by the majority of the Commission. At the very least the jury is still out on the question of the causes of homosexual behavior.

The majority is not trapped in this long continuing argument. Whether the behavior is voluntary or not, the individual concerned is entitled to equal rights under the law.

### **C. The Minority's Basic Tactic to Achieve the End They Desired Was to Claim There Were No "Benefits" from Marital Status and Therefore Nothing to Extend to Same-Sex Couples**

The first step was to get the Commission to adopt a definition of benefits which, when applied to various items, including those mentioned by the Supreme Court in *Baehr*, would show that they were not benefits. This attempt, described more completely in the majority report, was rejected twice.<sup>273</sup> Commissioner Hochberg, the main proponent of this device, was asked by the chair to apply his definition to benefits mentioned by the Court and others; he did so, and as expected, they turned out not to be benefits.<sup>274</sup>

The second and major attempt to eliminate benefits was the misapplication of an economic theory supported by the minority witness, Dr. Moheb Ghali. This theory apparently values a benefit on the basis of some value to the community and not to the individual who received it.

Chapter 1 contains a more complete explanation of Dr. Ghali's approach, but in simple terms, it would value a given benefit by dividing the value to the individual by the probability of someone taking advantage of it. For example, if a given benefit is worth \$500 to the individual who received it, but only one person in a thousand is likely to take advantage of it, then \$500 is divided by 1000 and the value is fifty cents.

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See also Watson, Traci and Joseph P. Shapiro, "Is there a 'gay gene'?", U.S. News & World Report, November 13, 1995, pgs. 93-96 citing a study published in the November issue of Nature Genetics of biologists from the National Institutes of Health who located a region on the X chromosome that is tied to homosexuality. This research supports earlier studies published in 1993.

272. *Los Angeles Times*, February 22, 1993.

273. See Minutes of September 27, 1995, pgs. 4 and 12, and Minutes of October 11, 1995, pg. 18.

274. See memo dated October 18, 1995 from Chairperson Gill to the Commissioners and Commissioner Hochberg's letter to Chairperson Gill dated October 25, 1995, in response.

The majority report found this concept rather difficult to apply when we are trying to determine benefits to individuals, but the minority would hang most of its case on this rather tenuous hook.

**D. Another Basic Minority Argument Against Extending Marital Rights to Same-Gender Couples Might be Called the "Ultimate Disaster" Approach**

Basically, this argument is that legalizing same-gender marriage would cause a flood of homosexuals to come to Hawaii which would not only damage our society but also repel other tourists. The minority presented no hard evidence to support this claim. Some of their witnesses did present very emotional statements based on their individual or religious beliefs. Interestingly this predicted flood is not consistent with the minority position that there are no benefits to be gained by marriage.

Related to this argument is the controversial estimate of an increase in gay tourists who would come here to be married, given in the recent *Southern California Law Review* in May 1995.<sup>275</sup> The author, Ms. Brown, estimated that each same-gender marriage could generate about \$6,000, and this could increase tourist revenue by some \$153 million per year. Both economists who testified--Dr. Ghali and Dr. La Croix--discounted or did not agree with--the methodology and some of the assumptions used by Ms. Brown.

However, after noting some assumptions, Dr. La Croix along with Dr. Mak, both of whom are professors of economics at the University of Hawaii, estimated that legalizing same-gender marriage could generate some \$127 million per year over a period of five years.<sup>276</sup> Dr. La Croix also gave his opinion that the number of same-gender couples who might respond to the legalization of same-gender marriage would not be so substantial when compared to the number of other tourists, to cause a "tipping" or loss of such tourists.<sup>277</sup> We should also note a subsequent letter from Dr. La Croix which points out various distortions of his position by the minority (see Appendix I).

The protection of family values is another reason claimed by the minority and their witnesses for the banning of same-gender marriages. When you consider the high proportion of divorces, teenage pregnancies, single parent families, and the not uncommon practice of couples living together without marriage, it would seem a bit ironic that the minority and their supporters would seek to prevent one group that wishes to promote marriage from doing so.

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275. See Brown, *supra* Note 113.

276. See Minutes of October 11, 1995, pgs. 9 and T-28 for testimony of Sumner La Croix, Ph.D. and James Mak, Ph.D.

277. *Id.* note 253.

Is it possible that there are many more troublesome areas where the minority and its supporters could productively promote family values than the one they have chosen here?

**E. Other Minority Positions Which Seem Questionable are the Rejection of the Relevance of the *Loving v. Virginia* Case and the Claim that Homosexuals Are Not a Suspect Class and Therefore—Like Criminals—Can be Subject to Legal Discrimination**

The United States Supreme Court some thirty years ago struck down a statute of the State of Virginia that prohibited interracial marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)). This case, which was cited by the Hawaii Supreme Court in its *Baehr* decision, raises the question of equal protection of the law. The opposition to interracial marriage (called miscegenation) was as emotional and passionate in the 1960's as the opposition to same-gender marriage now. Many of the same reasons, including destruction of existing society, were given then as they are now. The *Loving* case did not cause the collapse of society in Virginia or elsewhere, and the arguments now seem ridiculous, particularly in Hawaii. The minority apparently thinks our Supreme Court was misguided when it cited *Loving*. The majority agrees with the Supreme Court.

The minority attempt to reduce the status of homosexuals to that of a group that is somehow not entitled to certain constitutional rights deserves notice but not credence.

**F. A Final Argument by the Minority Is to Claim Mistreatment by the Majority**

The Commission understood and agreed early on that it had to address the tasks assigned to it by Act 5 with speed and decisiveness if it was to complete its work within the limited time allowed. Minority Commissioner Hochberg was told clearly by the Chair, on more than one occasion, that intentional delay would not be tolerated. It seemed obvious to all concerned that if the minority could delay the work of the Commission to the extent that no report would be issued, the minority would have achieved its end—to do nothing. In spite of this, an inordinate amount of time at Commission meetings was consumed by Mr. Hochberg picking over the details of the minutes, making repetitive motions, and trying to strike portions of the proposed report. He consumed far more time than any other Commissioner.

Mr. Hochberg is entitled to speak his piece, and has been given a minority opinion in which to do so, and he has. Each successive minority opinion grows longer and longer. The November 27 draft had already exceeded the length of the majority's report.

In that draft, Commissioner Hochberg adopted a further variation to his claim of "mistreatment"—he now has also been "railroaded." If the reader will excuse a brief attempt to inject a little humor into these rather vehement proceedings, we would suggest that Mr. Hochberg's claim to having been "railroaded" is not a completely inept use of the metaphor. While the use of steam locomotives in Hawaii as a means of transportation largely

died out in World War II, some may still remember how they worked and the impressive noises they made.

In this context, we would note that early on, in September when the Commission started work, self-appointed assistant engineer Hochberg jumped into the cab of the locomotive and attempted to jam the throttle so the train wouldn't start. He did this by writing self-serving letters to the Governor and others complaining about the Commission and its procedures (see Appendix H). This didn't work and the train kept moving.

Undeterred, Mr. Hochberg attempted to stuff wet logs into the locomotive's fire box so that the engine would never get up steam. Unfortunately, that didn't work either. (Some of these logs are cited or referred to in the minority opinion.)

Still determined, assistant engineer Hochberg attempted to either derail the train or at least get it onto a dead-end track. This included jumping out of the cab at every whistle stop to complain to the television cameras. However, that also failed. Now we have arrived at the designated station, on time, with a little steam left!

Our train is now dragging a caboose (read Minority Opinion) which continually grows in size and complexity. Commissioner Hochberg can now be expected to proclaim to any available lens or forum that his is the real report and that the majority's efforts should be disregarded because they are hopelessly prejudiced.

The majority appreciates Mr. Hochberg's persistent and single-minded efforts--they have been more helpful than he might have intended!

### III. Conclusions

The majority of the Commission--while not all agree on every point--believe that they have prepared a reasonable Report and suggested appropriate action to be taken by the Legislature. The majority also is aware that its first recommendation--to allow same-gender couples to marry under state law--is vehemently opposed by many people of certain religious persuasions. The majority has also recommended the adoption of a comprehensive Domestic Partnership law. This would apply to all couples, regardless of gender, and apply most of the benefits and burdens of marriage to many in the community who do not only live together, but also raise children without being married. We propose either of these solutions, or both.

The Legislature's job is to make tough decisions when required. We hope it can do so.