

**Commission on Sexual Orientation and the Law  
Legislative Reference Bureau  
State Capitol, Room 446  
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*Thomas P. Gill, Chairperson  
Lloyd James Hochberg, Jr.  
Robert H. Stauffer*

*Morgan Britt  
Nanci Kreidman*

*L. Ku'umeaaloha Gomes  
Marie A. "Toni" Sheldon*

**MINUTES OF THE MEETING HELD  
WEDNESDAY, OCTOBER 25, 1995  
(Continued to October 26, November 1, 2, 5, 6, 7, 1995  
as Adopted at January 4, 1996 Meeting)**

**I. Call to Order**

The fourth meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:10 a.m., at the State Office Tower, Senate Majority Caucus Room, Sixth Floor, 235 South Beretania Street, Honolulu. Members present were:

Thomas P. Gill, Chairperson  
Morgan Britt  
L. Ku'umeaaloha Gomes  
Lloyd James Hochberg, Jr.

Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

Ms. Pamela Martin of the Legislative Reference Bureau also attended the meeting.

*A one-page document entitled "Suggested Amendments to the Minutes of October 11-12 As Drafted" was distributed to the Commissioners and is attached as Attachment 1.*

It was suggested by Mr. Hochberg, and the members agreed, for purposes of time and to accommodate the guest speakers that the Commission forego the approval of the minutes until after the invited guests gave their testimonies.

Dr. Stauffer moved to have the suggested written amendments to the minutes as stated accepted, *because they were available*. Ms. Gomes seconded the motion.

*The Commissioners were given a few minutes' opportunity to review the suggested amendments. Dr. Stauffer added that Sister Chatfield's title on page 11 was not capitalized.*

Chair Gill suggested that further discussion of the minutes be postponed until the continuation of the meeting and any other suggested amendments be submitted in writing. Mr. Gill stated that Mr. Hochberg reserved his opportunity to return to the minutes of the October 11, 1995, meeting to amend them.

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Chair Gill summarized what the Commission would be attempting to do at the meeting. The topic for the guests would be item (3), section 2, of Act 5, Session Laws of Hawaii 1995 which states:

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

He stated that after hearing testimonies, the Commission would discuss the various motions submitted or to be submitted relating to items (1) and (2) of Act 5.

Ms. Martin reviewed the list of invited guests and briefly summarized the materials handed out for the meeting. She informed the Commission that invited guests, Daniel P. McGivern and Mely McGivern, would also be speaking. She added that invited guest, Dr. Robert Bidwell, postponed and instead would be testifying on November 8, 1995.

Ms. Martin added that the handouts included written testimonies from Bruce Fernandes of Maui, a letter from Sandra Pelosi, also from Maui. She also circulated a postcard addressed to the Commission from Penelope Spiller of Molokai and additional petitions from Mary Woodard's group.

Jon Van Dyke, Esq. Professor of Constitutional Law, William S. Richardson School of Law addressed the Commission first. Mr. Van Dyke reviewed the holding of the Baehr decision that "sex" is a suspect class under Article 1, section 5, Hawaii Constitution. As such the marriage law is presumed to be unconstitutional that must have a compelling state interest that is narrowly drawn to justify this. This second part, "narrowly" drawn is also interpreted to mean the State has chosen the "least drastic alternative", or the "least onerous alternative." Mr. Van Dyke pointed out the dramatic confrontational factors between the Legislature and the Courts in this issue. He pointed to the Baehr decision where the court states in very strong language that it rejects the argument that marriage is innately between a man and a woman, saying the argument is "circular...and tortured." In contrast Act 217, Session Laws of Hawaii 1994, says also in strong language, that marriage is meant for only a man and a woman and its a matter of public policy. Act 217 looks to notions of separation of power and implicates the Legislature's power to determine the will of the people, specifically admonishing the court that it has incorrectly interpreted the Constitutional's framers intent.

Mr. Van Dyke discussed various race-oriented cases where compelling state interests were found. See Mr. Van Dyke's written testimony attached to these minutes in the testimony portion at page T-9, for a full explanation of these cases. He stated that it was unclear if the Hawaii case, Holdman, was still valid.

Mr. Van Dyke reviewed the alleged compelling state interests that have been presented by the State to justify section 572-1, Hawaii Revised Statutes are (1) to foster

procreation, (2) create disproportionate incentives to move or remain in Hawaii, costing the state money and distorting the job and housing markets as well as altering the desirability as a visitor destination; and (3) allowing same-sex couples to marry conveys approval of non-heterosexual behaviors (see pg. T-8). He did not believe that any of these would be successful arguments in court because (1), which invokes the traditional family and the idea that marriage is linked to procreation, is flawed because the State has moved away from this requirement and it has not been pursued. (2) and (3) are more subjective and controversial in terms of acceptability. Regarding (2), there is law that says you cannot exclude undesirable people from your state. There is the right of free movement in the State. Finally, addressing (3), Mr. Van Dyke agrees that the government may set moral standards, but thinks it is hard to defend punishing people who don't meet that standard. That is, to encourage one type of family structure is different than discriminating against others.

*Mr. Van Dyke shared his belief that the procreation argument is a problem because the State has not consistently applied that interest. In fact, Mr. Van Dyke believes the State, generally discourages procreation. Mr. Van Dyke does not believe the State can successfully meet the "narrowly tailored" requirement.*

Mr. Van Dyke presented some ideas as to the public policies that would push the Commission one way or the other. They appear in the testimony on pg. T-12. He commented that finding a solution that respects all these elements and is not overtly confrontational is probably good. He sees the Domestic Partnership option as possible. He looks at it as a win-win situation. You give the same-sex couples the benefits of marriage, but keep the name of "marriage" for opposite sex-couples. He believes this would "moot" the case because they would not have any tangible injury.

Mr. Hochberg asked if Mr. Van Dyke based his statement on his understanding that objections of the public were of the word "marriage" or the substance. Mr. Hochberg continued that he believes that people who have testified at earlier meetings objected to the substance of allowing marriage regardless of whether one calls it domestic partnership. Is that respect for the diversity of religious views? Mr. Van Dyke recognized that it is a partial-win/partial-win situation. The fact that Act 217 recognizes the solemnizations.

Mr. Britt asked about what benefits a domestic partnership could provide in the area of income taxes, adoption, or inheritance, there isn't equity with marriage. With regard to the sacred relationship left for opposite-sex couples, wouldn't that be more akin to setting up a second class citizenship? Mr. Van Dyke stated that the State could supply all the economic benefits within their jurisdiction, so there must necessarily be federal litigation to resolve those issues. Mr. Hochberg stated that based on that information nothing short of marriage would "moot" the case. Mr. Van Dyke agreed that could be a possible outcome, but not likely he predicted. He believes the state court would say this is the logical accommodation of competing forces and there is no injury that justifies further litigation. Standing has three components: injury, causation, and redressability. The redressability, would drop out and the Supreme Court would have only an advisory opinion. Dr. Stauffer asked Mr. Van Dyke to confirm that domestic partnership is a "separate but equal" category, *i.e. separate but unequal*. Mr. Van Dyke agreed that a new category is being created. Dr. Stauffer expressed

his concern with regard to the federal benefits conferred by the status of "married", *i.e. that a domestic partnership could never equal marriage*. Mr. Van Dyke segued this question into his discussion on the full faith and credit clause.

Mr. Van Dyke confirmed that there are questions as to whether other states would recognize domestic partnership or same-sex marriage, especially if fundamental public policy concerns are violated. Mr. Britt questioned if any state had ever used this argument to refuse. Mr. Van Dyke replied that many states resolve the issue in court because usually they are slow to come around to a new way of thinking. This is especially so with the federal government, to address Dr. Stauffer's previous question. Ms. Kreidman asked how domestic partnership applies to opposite-sex couples that are not married. Mr. Van Dyke responded with a discussion on common law marriage, affirming that Hawaii does not recognize common law marriage. Ms. Kreidman encouraged Mr. Van Dyke along this line where he replied that there would be no reason not to allow opposite-sex couples to participate in domestic partnership because we already allow them to marry.

Finally, Mr. Van Dyke talked about imposing a residency requirement. He believes there is precedent that would make a residency requirement constitutional. See page T-15. Could you impose a residency requirement for domestic partnership even if we did not require it for marriage? Mr. Van Dyke would argue that there could be separate rules to develop new solutions to problems that wouldn't invite everyone to their shores.

Ms. Sheldon said if setting up domestic partnership that allows opposite-sex and same-sex couples to enter into domestic partnership you are not solving any problems, you are just re-creating a situation with a new law. Dr. Stauffer added that surveys on the Mainland indicated that 80% of those requesting domestic partnership status at the private level are opposite-sex couples. Ms. Sheldon confirmed and Mr. Van Dyke agreed that this situation could be used for fraud as is marriage. Ms. Sheldon continued, asking isn't the health of the community a compelling state interest? Mr. Van Dyke agreed but the health concern has to be narrowly drawn. The Commissioners brought up other health issues that are not restricted, for example domestic violence, smoking, and even the testing for certain diseases, which does not prohibit the license to marry it only requires awareness of the parties.

Mr. Hochberg referred to the concept that the people have put the authority on the Constitution not the legislature and therefore the Supreme Court has to determine the constitutionality of the marriage law. It is interesting because the polls of Hawaii are at least 2/3 against the extension of marriage benefits to non-heterosexual couples, so how is the Court supposed to take care of this interest of the people? *Mr. Van Dyke replied that the Constitution is designed to protect minority interests. The concept is that the Supreme Court is isolated in an ivory tower and insulated from the polls of the moment in order to draw upon eternal values of protection of minorities.* For example, the racial discrimination of the past... Mr. Hochberg interrupted and asked if the court recognizes these unions are not rooted in the tradition collective conscience and 2/3 of the polls agree and the legislative action why would an attorney argue that not allowing marriage is consistent with the Baehr decision? Mr. Van Dyke said an attorney could make that argument, but he did not think Judge Levinson would accept. It appears as if the Supreme Court has committed themselves in the other direction.

Mr. Hochberg seemed surprised then how Mr. Van Dyke could suggest that domestic partnership would moot the case. Mr. Van Dyke replied that he believed the Supreme Court was committed to fairness, tolerance and the other values our community is based on. If they saw a serious debate and solution that would compromise the situation, he believes they would accept it.

Mr. Hochberg pointed out other holdings in the Baehr case that Mr. Van Dyke did not discuss. One is that there is not a fundamental right of same-sex couples to marry. He asked Mr. Van Dyke if he thought that holding was important. Mr. Van Dyke agreed and also stated that the holding is inconsistent with the rest of the opinion, and he found that surprising. His class spent time discussing if that makes sense in terms of the whole opinion. He believes that the Supreme Court is struggling with the right to privacy. One case with regard to marijuana has not been reported out now for two years, so it appears as if they are deeply divided with regard to this issue.

The Commission recessed at 10:25 and reconvened at 10:36.

Mr. Hochberg continued his questions of Mr. Van Dyke. My question concerns this fighting between the Supreme Court and the Legislature and maybe you could explain to us when subsequent legislation could change a Supreme Court opinion. If it involves a statute, it is clear that the Legislature could amend the statutes to resolve it. If it involves a constitutional issue then the Supreme Court is the ultimate purveyor. For example we saw this in the abortion issues. The only way the legislature could accomplish overruling the Supreme Court in this instance would be by submitting a constitutional amendment to the public. In Hawaii it is relatively easy to amend or clarify the Constitution.

Mr. Hochberg pointed out that Mr. Van Dyke also left out of his discussion on the State's primary arguments the comity issue. Mr. Van Dyke explained that this argument that is tied to the Full Faith and Credit clause of the U.S. Constitution and means that each state has to respect the other state's laws. The argument rightly assumes that there will be litigation in other forums regarding the validity of same-sex unions or the marriage law itself as recognized in the State, but the Court would not likely view that as substantive argument and would probably categorize the argument under administrative convenience. It is a financial burden and a hassle, but it will not lead to war. And although administrative convenience arguments are relevant at times, it is not when fundamental rights and strict scrutiny issues are at hand.

Mr. Hochberg affirmed that Mr. Van Dyke did say that the state may set moral standards but he also said that the people that don't meet those standards don't have to be punished. He compared the situation with the morality of requiring deadbeat dads to pay child support or else we punish them. Mr. Van Dyke clarified for Mr. Hochberg that the deadbeat dad is doing something illegal. The same-sex couple does not engage in illegal activity in Hawaii. Mr. Hochberg stated that there are 23 states that still criminalize sodomy. Mr. Van Dyke agreed but reiterated that Hawaii is not one of them. Mr. Hochberg restated Mr. Van Dyke's position to be as long as people are not committing a crime they should not be punished. Mr. Van Dyke agreed.

Mr. Hochberg addressed Mr. Van Dyke's discussion regarding how the procreation argument is weak because it has been inconsistently applied. Mr. Hochberg stated that because the State does not ask couples if they will procreate, they don't know. Mr. Van Dyke disagreed. The State knows that if two 75 year-olds married, they could not procreate. Mr. Hochberg stated that he believed that was an extreme example to invalidate the question and by and large the majority of the licenses issued the State does not know because nobody asks. So the State is not inconsistently applying it, they plain just don't ask. Mr. Van Dyke tried to clarify Mr. Hochberg's point by asking then, if the State should not ask same-sex couples if they are going to procreate? Mr. Hochberg said they don't need to because it's plain on the face. Mr. Van Dyke agreed that it was plain on the face of the 75 year olds as well. Mr. Hochberg disagreed and stated that Sarah was 90.

Mr. Hochberg also brought up that Mr. Van Dyke did not discuss the Hawaiian traditions. He stated that it is probably agreed that there are some Hawaiian traditions we would not want to adopt. Mr. Van Dyke agreed, that human sacrifice and that women could not eat bananas should not be revived. Mr. Hochberg tried to confirm with Mr. Van Dyke his position by returning to the Baehr decision and *the* belief that same-sex marriage is not part of the collective conscience of Hawaii as well as in light of the history. Mr. Hochberg cautioned that we don't want to throw out all this information to simply move this forward, and we need to sit down and think it through in greater detail. Mr. Van Dyke agreed that the Commission's job is to look at these issues and paying respect to people's views is an appropriate thing to do here, and in the Legislature, to avoid confrontation and to look for compromises.

Mr. Hochberg referred to the allowance of private solemnizations of same-sex unions as enacted in Act 217, Session Laws of Hawaii 1994. He questioned how the leap could be made that the State has already accepted these type of relationships? Mr. Van Dyke responded that when you look at the decriminalization of behaviors, and that particular statute in Act 217 specifically acknowledges the relationship. Upon further questioning by Mr. Hochberg, Mr. Van Dyke stated he did not participate in the Act 217 legislation.

Chair Gill asked Mr. Hochberg how much more time it would take for him to finish his questions for Mr. Van Dyke. Mr. Hochberg responded by stating the he deserved and expected fairness from the Chair. The Chair reminded Mr. Hochberg that there are other speakers and if needed we could invite Mr. Van Dyke to return. Mr. Hochberg said that he would finish in time for today. Mr. Gill confirmed another five or six minutes. Mr. Hochberg agreed.

Mr. Hochberg questioned Mr. Van Dyke that these same-sex unions will not be required to be performed by every religious organization, which is required by the First Amendment. Mr. Van Dyke agreed that it is a logical conclusion. Mr. Hochberg added that the marriage law already has restrictions in it. Mr. Van Dyke also agreed.

Mr. Hochberg wondered how the big pot of people gets stirred up in the different situations, married, living together, and now domestic partnership (but no common law). Does the opposite-sex, living together couple have an opportunity for domestic partnership?

Mr. Van Dyke said that the burden is small for any opposite-sex, living together couple. They need only come forth and register, regardless of whether it is domestic partnership or marriage so it is unlikely that a new equal protection class would be generated if domestic partnership included opposite-sex couples. Mr. Hochberg was concerned that the burdens of marriage are what keep the opposite-sex couples from marrying. Mr. Van Dyke agreed that those burdens should be applied to domestic partnership, including making it difficult to get out. Mr. Hochberg asked if Mr. Van Dyke would be surprised to hear the Commission is not looking at any burdens, just goodies. Mr. Van Dyke refused to comment on that. The Chair added that the statement was false.

The Chair reminded Mr. Hochberg of his five-minute promise, made ten minutes ago. Mr. Hochberg assured the Chair he would be done "real soon." The Chair gave Mr. Hochberg an additional five minutes.

Mr. Hochberg asked how we bridge the gap between the economic disproportion between those who can get married and those that can't? He continued that it was his opinion if we removed the benefits from the marriage tag, so that no benefits are associated with marriage or domestic partnership wouldn't that solve the problem? Mr. Van Dyke agreed that is an option worth looking at, eliminating the marriage law from the state statutes altogether. Mr. Van Dyke's guess is that more people would be uncomfortable with that action based on the experience of people and their importance of marriage. Mr. Hochberg interrupted Mr. Van Dyke to clarify his point that he was not suggesting repeal of the marriage law, but only looking at the list of statutes that purport to be benefits, burdens and things that are impacted by marriage. What if they were marriage neutral? Mr. Van Dyke said an examination of each statute would have to be made and it may be that some places it could be separated, but others, like inheritance and custody, are linked to marriage for good reasons.

Copies of the overhead presentations used by Mr. Van Dyke are attached as his testimony to these minutes at pages T-3 to T-15.

Frederick Rohlfing III, attorney in private practice and former Act 217 Commissioner, was the next speaker to address the Commission. He promised that he wouldn't be as long as Professor Van Dyke.

His testimony started with a review of parts of the Baehr case that was not covered by Mr. Van Dyke. Mr. Rohlfing focused on the holding that there is no private right to marry, and therefore Justice Levinson's reliance on Loving is misplaced. He believes the Baehr decision is faulty because of their reliance on the Loving case where the ban on interracial marriage was struck down because the couple had been deprived of their liberty and due process of law under the United States Constitution Fourteenth Amendment. The same privacy consideration that Justice Levinson failed to find. So, it's only after *that* point where the opinion finds that there is no fundamental right to same-sex marriage *that it errs*. He borrowed Professor Van Dyke's overheads regarding the Baehr case.

It is Mr. Rohlring's view that if there is no fundamental right to same-sex marriage the Court ought to have given more respectful treatment to the role of gender in Hawaii's marriage law than they did. The discrimination analogy to Loving overlooks the specific unique type of discrimination that existed in the Loving case, that of a long tradition of White Supremacy. Virginia only prohibited marriages between Whites and other races and therefore, viewed in context, created a system of racial caste. Justice Levinson should have realized, as Justice Heen did, that the identical treatment of men and women under the Hawaii marriage law makes it consistent with the equal protection provisions of Hawaii's Constitution. Heterosexual marriage does not discriminate on the basis of sex because it does not draw a line between what men and women can do or what benefits will be received.

In overcoming the facial neutrality the Supreme Court should have focused on the intent of the drafters, which was not accomplished. Statutes prohibiting homosexual marriage don't convey any sexist message or inferiority of one gender over another.

Mr. Britt commented that it does contribute to a heterosexist bias. Mr. Rohlring agreed. Mr. Britt suggested that what if in Mr. Rohlring's written testimony, particularly on page four, the words Homophobia or Heterosexism were substituted for White Supremacy what kind of conclusions would you come up with? Mr. Hochberg replied that race is immutable and homosexuality is behavior. Mr. Britt disagreed and clarified that it is Mr. Hochberg's presumption that homosexuality is not immutable. Mr. Britt, apologized for interrupting and asked Mr. Rohlring to continue. Mr. Rohlring added that it was interesting that Justice Levinson avoids that whole argument. Mr. Britt agreed.

Mr. Rohlring suggested that the the Supreme Court's analogy to miscegenation laws is ironic and the Court should have recognized that what we are dealing with is the possibility of sexual apartheid that is implicit in homosexual marriage. If Justice Levinson had considered these arguments he would have come up with a more intermediate standard. The Supreme Court never investigated the intent of the framers and if they had they would have agreed as Mr. Britt does in his memo, that the framers probably never intended for the equal protection clause to allow same-sex marriage. Now the Baehr case operates as holding the legislature hostage to the Supreme Court. If the legislature tries to untangle marriage from certain benefits, he agrees with Mr. Van Dyke, that *it would be difficult*. Some of these laws are so bound up in marriage that perhaps they are inseparable. But some of the *connections to marriage* are irrational, for example the fishing license statutes.

The point is that marriage is not a creature of the State, regardless of the State's exclusive authority to certify it. The marriage laws go much farther back in time. As other people who have spoken before me these marriage powers can have both good and bad consequences. There are three legal responses to this. The three categories are (1) prohibited behavior; (2) permitted relationships; and (3) preferred relationships and conduct. Homosexual relationships have historically been placed in the prohibited behavior and have moved into the permitted relationships category along with adultery and fornication. But no state has escalated these relationships to the preferred category.



Mr. Britt asked if the words adultery and fornication are actually used in the Hawaii Revised Statutes. Mr. Rohlring replied, "Not any more." Mr. Britt clarified then they aren't part of the argument. Mr. Rohlring said *the discussion needs to be included to show how certain behaviors have been treated*. Mr. Britt further clarified Mr. Rohlring's *point to be that just* because a behavior is legal we don't have to make it preferred. *Mr. Rohlring agreed*.

Mr. Rohlring continued that marriage is one of the oldest preferred behaviors known, so extending marriage to same-sex couples is not a demand for tolerance, it is a demand for the special protected status of marriage.

Mr. Rohlring added that with regard to extending domestic partnership status to same-sex couples, some of the concerns from the perspective of legislators might be, "Why should domestic partnerships be limited to same-sex couples? Like business partnerships, why should these partnerships be limited to just one partner. If marriage appears to be an arbitrary category, why create a new category of domestic partnerships?"

The Chair asked Mr. Rohlring if he had a recommendation. Mr. Rohlring replied that his recommendation is very brief, it is that any means of extending the traditional benefits and obligations of marriage to homosexual couples is inappropriate.

The Chair clarified Mr. Rohlring's position as "do nothing". Mr. Rohlring agreed with the caveat that except for benefits that are tied to marriage that are irrational, for example hunting licenses.

Mr. Rohlring submitted written testimony *that is attached at pages T-16 to T-26*.

Mr. Thomas P. Coleman, Esq., Executive Director of the Spectrum Institute. Spectrum helps government agencies and corporations with changing social and family diversity to reflect present day realities. He has been an attorney for 22 years and for all of those years he has been fighting to end sexual orientation and marital status discrimination. He has promoted inclusiveness in the definition of family and promoted the right to privacy. He has worked with all levels of government, City, State and Federal. So he is here today to talk about reform.

Mr. Coleman and Spectrum Institute recommend a comprehensive domestic partnership. The language of the current domestic partnership bill in the Commissioner's hands is more for a limited domestic partnership but a comprehensive domestic partnership bill would be shorter because it makes general statements authorize the status of spouse on the partners in a domestic partnership. He stated that no State of Nation has ever taken this step. Even in the Scandinavian countries there are caveats and exceptions in their domestic partnership laws. Mr. Coleman believes Hawaii has shown a progressive attitude towards the acceptance.

Mr. Coleman presented his testimony from a series of charts that are reproduced in the written testimony portion of these minutes attached as T-40a through T-40e.

"During Mr. Coleman's explanation of the factual situation versus the legal situation of same-gender "families" in Hawaii, Mr. Hochberg offered that heterosexual unmarried couples with biological children are not recognized as families either because we don't have common law marriage. Mr. Coleman replied that factually, they are still families too, even if the law doesn't recognize them. Ms. Sheldon asked if domestic partners would be included in the domestic violence laws, where if police were called to the scene, one of them would go to jail? Mr. Coleman replied, "Naturally. It would be the same."

*Mr. Coleman referred to the numerous statutes in the list produced by the Legislative Reference Bureau that indicate that benefits exist and Mr. Hochberg interrupted to say that the Commission has not reviewed the statute list. The Chair asked Mr. Hochberg to allow Mr. Coleman to continue.*

*Mr. Coleman responded to what he has heard today regarding just keeping the status quo. He pointed out that national statistics of opinion polls reveal that 30% are absolutely against it and would like to re-impose criminal penalties, and there's 30% of the public that support the legalization of same-sex marriage and 40% say that some kind of reform is necessary but they don't feel comfortable with the solution of same-sex marriage. Mr. Hochberg interpreted Mr. Coleman's 30-30-40 breakdown to make him appear in the middle, and stated that no one in Hawaii has suggested criminalizing sodomy. Mr. Coleman clarified that in national polls those people that are Christian conservatives support criminalization of homosexual relationships. Mr. Coleman quoted a Los Angeles Times poll where one of the questions asked was how do you label yourself? Mr. Coleman said that he would provide the exact poll when he returned to the mainland.*

*Mr. Coleman suggested that there are five possible actions available to Hawaii: (1) do nothing which he predicts will result in a court-ordered same-sex marriage; (2) pass a Limited Domestic Partnership Act which he believes will have the same result as (1); (3) pass a Comprehensive Domestic Partnership Act which he predicts the Court may accept as satisfying the equal protection clause; and (5) eliminate marriage as a civil institution which Mr. Coleman predicts will not happen. See Chart at page T-40e attached.*

*When Mr. Coleman had finished his presentation, Mr. Hochberg suggested that there could be another suggested action on the list that would make it very clear that Baehr v. Lewin is overturned and that would be a constitutional amendment that prohibited any marriage except between one man and one woman. Mr. Coleman agreed that would be a sixth option, but he commented that he did not believe the votes were there in the Legislature for that option. Mr. Britt offered that there could be a federal Constitutional amendment, but that isn't going to happen either.*

*Dr. Stauffer, referred to one of his articles where he stated there are one thousand statutes that are driven by state-issued marriage certificates and as the Commission does not have the time or money to investigate this, do you have an article where these are enumerated? Mr. Coleman clarified that there are 1499 hits under a WestLaw search of marriage and spouse and further clarified that most likely the figure is closer to hundreds because one statute may use the terms more than once.*

*The Chair asked Mr. Coleman if he had a format for the comprehensive domestic partnership law and Mr. Coleman volunteered to send his recommendations upon return to the mainland, and it would be less than about two pages.*

*He volunteered that his domestic partner and he will be moving to the Big Island in January, and that he actually has a stake in the outcome. Mr. Hochberg commented that brings to mind several questions, how long have you been working on this issue in Hawaii? Mr. Coleman replied that he has been following the issue from the summer of 1993, when Representative Tom held informational hearings on the neighbor islands. He attended the one on the Big Island while on vacation. Mr. Hochberg asked how come he couldn't find any information on Spectrum Institute or yourself as an author? He looked in Books in Print, Readers Guide, Periodical Literature, and computer databases on West Law and the Legal Infotrack CD-ROM. The only listing was an interview published in the Los Angeles Times in September of 1981. Is your organization a ghost and is this just a pet project of yours after 22 years of lawyering? Mr. Coleman responded, "No." He further stated that the Spectrum Institute has worked with the State of California on these and other similar issues. Mr. Hochberg said he could do the same thing in Hawaii, incorporate and have a pet project, just be honest. Mr. Coleman stated that he could not vouch for Mr. Hochberg's search, and continued to say that the Spectrum Institute has two primary projects. Ms. Kreidman interrupted, stating that she did not feel comfortable having Mr. Coleman substantiate his organization. Dr. Stauffer reminded the Commission that Mr. Coleman has travelled from the mainland at no cost to the Commission to provide his testimony and that we should respect that, even if the Spectrum Institute is not a big organization. Mr. Coleman confirmed that it is a small non-profit organization. Mr. Hochberg disagreed with Dr. Stauffer and stated that it is his right to know, and further stated he believed the Commission didn't care because Mr. Coleman's testimony fit into the majority's agenda.*

*Mr. Hochberg asked Mr. Coleman if he was familiar with Martine Rothwell, who wrote a book called the Apartheid of Sex? Mr. Coleman was not. Mr. Hochberg asked if Mr. Coleman's view of full equality was similar to hers? He stated her position to be: Martine Rothwell was born Martin Rothwell, after being married and having two kids and a career as a lawyer for twenty years and making a lot of money in satellite law, got a little bored. He and his wife thought it would be interesting to live the second half of their lives as a same-sex couple and he went and got a sex-change operation. Now the ABA parades them around as a lesbian couple. Is that the goal of full equality? Mr. Coleman responded that under current law if someone has a sex-change operation they are treated... Mr. Hochberg interrupted to say that was not his question, he clarified that his question was is your institute, your movement that is seeking the full equality, that is what we're talking about? Mr. Coleman replied he thought it sounds like that's what Mr. Hochberg was talking about. The Chair asked Mr. Hochberg to clarify his question.*

*Mr. Hochberg continued, if you have domestic partnership and two men are in prison, how do you deal with that problem, are they allowed to have domestic partnership marital relations together? They are allowed to have relations none of the other heterosexual prisoners*

do. *Mr. Coleman disagreed. As Professor Van Dyke said with regard to prison security, there are more strict guidelines that are allowed to keep order. Criminals are treated differently.*

*Mr. Hochberg confirmed that Mr. Coleman is suggesting a simple 2-page piece of legislation stating why this is a good idea and the domestic partnership status equals the "spouse" status wherever they appear in the statutes. Mr. Michaels, the First Deputy Attorney General said when he was here that that law would be unconstitutional, vague and would have to change every statute. Mr. Coleman replied that the legislature can do that. Simply reference those statutes, if you have to reference the specific statute you just do it.*

Both Mr. McGivern and his wife agreed to testify in time for a break at noon. He read his testimony and *stated that this is the first time he ever appeared before a body, knowing that what he and others have to say makes no difference. He stated that nothing would sway the opinions of the Commission or change the ultimate result that would lead to domestic partnership law. His written testimony is attached at page T-42.*

Mely McGivern stated that she was a guest of Toni Sheldon and feared that her birthplace is close to becoming a Sodom and Gommorah of the World. She believes that the action of the Commission could lead to same-sex marriage or domestic partnership. Her written testimony is attached.

There were two comments from the public. The first speaker was Laurie McNamara. She stated that she didn't judge lesbians but believed that if these laws are passed, you'll have people doing it for financial benefit, for example, military housing and people with children from previous marriages will get together because it will be a lot cheaper and the government will pay for it. It will be very expensive.

The second speaker was Sherry Silva. She stated that she didn't have any specific reasons other than she was Christian and didn't think it was right. She quoted the State motto and added that it used to mean something. She did not want to impose the death penalty on people who entered into this kind of relationship but she did not approve and felt that being responsible for her children, she would find it difficult to have her children play with the children of same-sex couples. She commented that she wanted a moral environment for her kids.

The meeting recessed at noon to be reconvened on October 26, 1995.

**October 26, 1995**

The meeting reconvened at 9:15 a.m. on October 26, 1995. All members were present.

*Mr. Hochberg called the Commission's attention to the imbalance of the minutes of October 11, 1995.*

*Mr. Gill stated: "We have to be polite and hear what everyone has to say."*

*Mr. Hochberg moved that the materials presented by Dr. Ghali and other speakers be listed in the minutes. Ms. Sheldon seconded the motion and Dr. Stauffer spoke in favor of it. The motion passed with four ayes and three abstentions. The Chairperson, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voted aye, with Ms. Gomes, Mr. Britt and Ms. Kreidman abstaining.*

*Mr. Hochberg moved to add the clinical psychologist credential to Dr. Kehoe's name in the October 11, 1995 minutes. The motion failed with Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Gomes, Mr. Britt and Ms. Kreidman abstaining. The Chair did not vote.*

*Mr. Hochberg then moved that the minutes reflect that Ms. Martin produced a written transcript of portions of the audio tape from the September 27, 1995, minutes and they were discussed. Dr. Stauffer, speaking against this motion, stated that he understood changes were to be presented in writing ahead of time. Whereupon Mr. Gill question Mr. Hochberg as to the amount of changes he had to present. Mr. Hochberg asked to be permitted to present those he had submitted in writing. After much discussion Mr. Gill asked Mr. Hochberg to restate his motion, and Dr. Stauffer described that motion as a lengthy one concerning Ms. Martin's transcript.*

*Mr. Hochberg moved to have his changes incorporated in the minutes, but Mr. Gill stated that what Mr. Hochberg wants is a transcript and he won't get it. Mr. Gill stated: "We have to move on and not spend time going over this."*

*Dr. Stauffer called for the question and summarized Mr. Hochberg's motion. The motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, and Dr. Stauffer voting nay. Ms. Kreidman abstained.*

*Dr. Stauffer then moved to table discussion on the minutes and send out a new written transcript. Mr. Hochberg spoke against the motion stating that the majority has had an agenda to railroad this through. Mr. Hochberg pointed out that the policy of review is not established as requiring written proposed amendments and that these (the October 11, 1995) minutes connoting the most important testimony on economic matters. Mr. Hochberg noted that failing to review the contents of these minutes diminishes the value of the majority report and makes its contents intellectually dishonest.*

*Dr. Stauffer called for the question and a vote was taken. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye and Mr. Hochberg and Ms. Sheldon voted nay.*

*Mr. Hochberg then moved to handle those amendments he had submitted in writing (attached as Attachment 2).*

*Mr. Gill ruled Mr. Hochberg out of order. Mr. Hochberg appealed the ruling, Ms. Sheldon joined in that appeal. Mr. Hochberg's appeal was defeated with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay, and Mr. Hochberg and Ms. Sheldon voting aye.*

*Mr. Hochberg moved to table all discussion on any substantive material until the Commission members reviewed and analyzed LRB's list of statutes and addressed whether there are major legal or economic benefits the Commission should be dealing with. Ms. Sheldon seconded the motion. The motion failed with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.*

*Mr. Gill informed Mr. Hochberg that his right to bring the amendments to the October 11, 1995 Minutes was being reserved and he could bring up those amendments at a later time.*

**III. Discussion and Organization Relating to: (1) The Identification of Major Legal and Economic Benefits Extended to Married Opposite-sex Couples, But Not to Same-sex Couples; and (2) Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits in Part or in Total to Same-sex Couples with Voting on Motions as Needed**

**Memorandum No. 1**

Dr. Stauffer moved to adopt the two-page treatment of terminology, starting with the word "Terminology" on the bottom of page 3 and continuing to the second paragraph on page 5 as a guiding principle of the Commission, and reads as follows:

Terminology

The phrase "major legal and economic benefits" is not otherwise defined in the law, nor is it otherwise defined in the committee reports which accompanied the legislation.<sup>1</sup>

Lacking direct guidance from the Legislature, the Commission has employed the applicable rule of interpretation,<sup>2</sup> concluding that the words in the phrase should carry their normal and customary meaning.

The First Deputy Attorney General of the State of Hawaii, in testifying to the Commission, expressed the view that the Hawaii Supreme Court, in sending the case back to circuit court, may have been intending the Legislature (and hence the Commission as established by the Legislature) to investigate the topic. It therefore appears reasonable to see if the Supreme Court has given any guidance on what might be considered as "major legal and economic benefits."

- 
1. Cite all committee reports.
  2. Give the citation.

The Supreme Court did not directly address the issue using that phrase, but it did list 14 separate provisions of State law that the court considered to be numbered amongst "the most salient marital rights and benefits."<sup>3</sup>

One of these "most salient" benefits is noteworthy: "the right to change of name pursuant to HRS §574-5(a)(3)."<sup>4</sup> The change of name fee is currently \$50, but at the time of the court's decision was only \$10. Even with the added burden of a required newspaper public notice and the fee to an attorney to file the necessary papers, the purely economic value of the benefit is only about \$300 today,<sup>5</sup> and \$250 or less at the time of the court's decision.

The Commission finds that the court appeared to rest its "most salient" reasoning on a combination of legal and economic factors and that even a benefit of name-change can be considered a "most salient" or "major" benefit. Importantly, the court appears to take into account factors (such as newspaper fees for legal advertisements, or private attorney fees) that are not the direct effect of a law but are only indirectly required by a law.

*Mr. Hochberg moved to table all discussion on substantive material until the Commission looks at the statutes it received on September 13, 1995, analyzes the LRB attorney's report of the definitions of those statutes, and actually determines whether there are any major legal and economic benefits in those statutes which the Commission needs to address.*

*Ms. Sheldon inquired as to the fact the Dr. Stauffer's memos address things the Commission has not discussed. Mr. Gill stated that was not true, that the Commission had received a list of the statutes and had time to review them. Ms. Sheldon replied that reviewing the LRB's list is not the same as discussing the statutes.*

*Ms. Kreidman inquired as to whether Ms. Sheldon wanted to go through the statutes and determine whether it's a benefit or a burden. Ms. Sheldon replied that she does not think*

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3. Baehr v. Lewin, 74 Haw 560 (1995).

The operative terms here are "salient," used by the court, as opposed to "major," used by the Legislature.

The court did not otherwise define "salient," again leaving the Commission to employ its customary and common meaning.

A comparison of the two words shows them to have very similar, and at times identical, meanings.

Salient means "standing out conspicuously; prominent, striking." Major means "notable or conspicuous in effect or scope; considerable."

The court added the modifier "most," as in "most salient," which if anything suggests the court's list includes a rarefied level of benefits. As such, the Commission's list should include the court's list, but add more items to it.

4. Baehr v. Lewin, 74 Haw. 561 (1993).

5. See the discussion about the current \$300 cost, on page <27> of this report.

*we have determined what is a benefit and what is a burden because we do not have a definition.*

*Dr. Stauffer stated that the motions he intends to bring will address all statutes.*

*Dr. Stauffer stated that it is vital that we begin by defining our terms. He stated that major legal and economic benefits are not defined in the legislation or committee reports so we use normal and customary meaning.*

*Dr. Stauffer moved to accept his definition of major legal and economic benefit, which would include changing your name as a most salient benefit, as the Commission's guiding principle in determining major legal and economic benefits.*

Mr. Hochberg spoke against the motion and requested a verbatim transcript of his discussion. It is as follows:

"Two reasons not to follow this definition. One of them is, what the Supreme Court was saying, when a Court says something is a salient aspect in a case, what they're saying is we haven't done exhaustive research, this is what stands out to us, at a minimum.

"Number 2, what we've been asked to do by the Legislature is not what the Supreme Court was doing when it made its list. And what's important under that is the change from one Commission's charge in 1994 to our charge in 1995, that language change is the critical language change because we're looking at legal and economic benefits and all the Supreme Court was doing, is looking at, are there things that stand out in the statutes that you can't have if you don't have a marriage license. So what the Supreme Court was looking at is different from what the two commissions were looking at and then in analyzing the use of the language to determine what it means because it wasn't defined by the legislature the change from precise to major is how you define what the legislature meant in 1995. What the legislature didn't want, I think, is what they had asked for the first time; which is a precise list, which is a list of every single thing to the minutest detail. What they want is what are the major benefits, and they want to know what the major economic benefits are. And Professor Ghali told us how you come up with what a major economic benefit is and Sumner La Croix agreed, he did not disagree that you don't just identify a value, for instance, on an in-state tuition for a nonresident spouse of a professor, you have to ask the question, what is the likelihood, the probability that the benefit is going to be taken advantage of. And then you reduce the dollar value by whatever that proportion is and a \$1,500 value becomes \$1.50, which is not what the legislature is worried about."

Chair Gill suggested that when the Commission, assuming it does, adopts a particular benefit, as being a benefit it is going to report that as the definition of major. If the legislature or Court agrees or disagrees is their business. *Mr. Gill stated that we don't want to get wrapped up in a convoluted definition of what we thought the legislature meant, if they thought about it at all, which is why Mr. Hochberg's motion failed twice early on.* The Commission will make its decision on each issue of what a major benefit is, based on how it is used. *Mr. Hochberg stated that major means significant and salient means stands out. Mr. Gill*



stated that "we (the majority members of the Commission) are just making sure that Mr. Hochberg doesn't gas the thing to death and try to kill the report."

Dr. Stauffer agreed with the comments of the Chair and did not want to second guess the legislature by using a precise definition, but tried to simply review the language and let it stand as it is. He said that the actual determination of whether an item is substantial or major will be made as the Commission reviews his memorandum. He then called for the question.

Ms. Martin then repeated the motion which was: "to adopt the two-page treatment of terminology, starting with the word 'Terminology' on the bottom of page 3 and continuing through the second paragraph on page 5 as a guiding principle of the Commission."

Mr. Hochberg asked for clarification for the effect of adopting this terminology. It was his understanding that because the Supreme Court listed as a most salient benefit the right to change one's name for free, which would otherwise cost \$10, that it would be considered a major benefit that the Commission would be testing other items against.

Dr. Stauffer said that the two-page treatment stands on its own and that the last paragraph which states: "The Commission finds that the court appeared to rest its 'most salient' reasoning on a combination of legal and economic factors and that even a benefit of name-change can be considered a 'most salient' or 'major' benefit....", gives a good summary. He continued that the language is amendable and could be included as a footnote or stand as is but it is included to be a guiding principle, as a foundation to work with. He again called for the question.

Mr. Hochberg asked Dr. Stauffer to respond to the statement and questioned whether the Commission was using ghost written material. Ms. Sheldon supported Mr. Hochberg's questioning.

Ms. Kreidman expressed her discomfort with the tone and degree of Mr. Hochberg's and Ms. Sheldon's personal attacks and Mr. Hochberg's questioning of intellectual honesty.

Dr. Stauffer again called for the question.

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

### **Memorandum No. 3**

Dr. Stauffer moved that the following non-Hawaii Revised Statutes (HRS) benefit treatment be adopted by the Commission, subject to later review and amendment as appropriate. This motion is from pages 1 through 5 of Memorandum No. 3 and refers to international, federal, and other states' implications *and reads as follows:*

**"Major Legal and Economic Marriage Benefits Extended to Opposite-Gender Couples, But Not to Same-Gender Couples"**

**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 that 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 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.

**Federal Implications**

Under the American federal system of governance, the conferring of marriage certificates has been reserved to the individual sovereign States, including the State of Hawaii.

The granting of major legal and economic marriage benefits have not been limited to the States, however, as the Federal government has provided a vast array of such benefits. In all these cases of Federal marriage benefits, however, the determination of whether such major benefits should be conferred is based on whether the couple, or an individual within a couple, possesses a marriage certificate issued by one of the States.

As noted by Dr. Randall W. Roth, professor at the William S. Richardson School of Law, these matters "relate to federal law, but are driven by a couple's marital status as determined by state law."<sup>6</sup>

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6. Roth, Randall W. "Testimony to Commission on Sexual Orientation and the Law." Mss. September 27, 1995. Page 2 of written testimony.

The Commission finds that Federal law and administrative rules<sup>7</sup> literally encompass tens of thousands of pages of material. The Commission further finds that within that mountain of paper there are known to be a substantial number of laws and rules that bestow major legal and economic marriage benefits. Further, that these in turn are bestowed on the basis of a couple, or a member of the couple,<sup>8</sup> possessing a State marriage certificate. Hence the Commission further finds that the State of Hawaii, in conferring such certificates, is indirectly conferring these Federal major benefits. Further, that these conferred-benefits have substantial economic value.

Despite the presence of such laws, rules, conferred major benefits, and substantial values, the resources appropriated to this Commission are insufficient to carry out a complete review of these Federal benefits.

So important is examining individual Federal benefits, however, that the Commission could not entirely pass by carrying out such precise analysis as the Commission did with the question of international benefits. The Commission therefore has been able to concentrate on a very few well-known Federal benefits, and these are included within the Commission's more detailed analysis that is contained below.

#### **Other States' Implications**

Much like the analysis above regarding foreign countries, the other 49 sovereign States, the District of Columbia, and the territories and possessions of the U.S., grant large numbers of major legal and economic marriage benefits on the basis of a couple possessing a Hawaii marriage certificate. These benefits, in turn, carry substantial economic value.

Because of our country's federal system of governance, as epitomized in this instance by the "Full Faith and Credit" clause of the U.S. Constitution,<sup>9</sup> these other jurisdictions are bound, except for certain exceptions, to recognize Hawaii's marriage certificates and to provide the same major legal and economic marriage benefits to couples with Hawaii certificates as those jurisdictions give those couples with marriage certificates from the "home" State. Therefore, because of this overriding Federal Constitutional provision, the chances of a Hawaii-certified couple receiving such benefits is higher within these jurisdictions than within foreign countries.

At the same time, the Commission does not have the resources to provide an exhaustive list of these other jurisdictions' benefits, nor to consider whether a same-

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7. i.e., Public Laws and Federal Regulations.
  8. Some benefits are conferred to one member of the certified couple, such as the right of the "economically weaker" member to sue the other for support.

In this report, the phrase to "benefits to a couple" shall be generally understood to include benefits to individual members of the couple, even if the text does not directly refer to the individual members.

9. Give citation.

gender couple with a valid Hawaii marriage certificate would be entirely protected under the Full Faith and Credit Clause.

The Commission therefore finds that the major marriage benefits granted by the State of Hawaii, and as reviewed in more detail later in this report, are similar to those granted by other U.S. jurisdictions. The Commission further finds that the right of a couple, legally married in Hawaii, to enjoy the substantial values of these benefits in these other jurisdictions is generally based on possessing a Hawaii marriage certificate.

#### **Hawaii Administrative Rules; Hawaii Political Subdivision Ordinances and Administrative Rules**

The Commission finds that there are thousands of pages making up the uncodified Hawaii Administrative Rules, that these rules have the force and effect of law, and that there are a multitude of major legal and financial marriage benefits granted under the provisions of these rules. The Commission further finds that these major marriage benefits constitute a significant economic value. Besides these findings, however, the Commission has chosen to concentrate on Hawaii law and not to investigate Hawaii's administrative rules.

Likewise, the Commission finds that there are major marriage benefits granted through the ordinances and administrative rules of the political subdivisions of the State of Hawaii. The Commission further finds, in these cases, that unlike the cases of international, Federal, or other-U.S.-jurisdictions, there is here no question that Hawaii law and Hawaii marriage certificates would control.<sup>10</sup> The Commission further finds, for couples married in Hawaii, that all marriage benefits granted under an ordinance or rule of a political subdivision of the State of Hawaii are conferred only to those couples possessing Hawaii marriage certificates, and that these benefits have a substantial value.

The Commission will not otherwise investigate the matter of Hawaii political subdivision marriage benefits, on account of a lack of resources to carry out such a detailed task."

Mr. Hochberg moved to include the word "salient" before "major legal and economic..." in the title of the draft proposal *as stated above*. *It was pointed out by Mr. Hochberg that there was no second, at which point* Ms. Sheldon seconded the motion.

Dr. Stauffer spoke against the motion stating that the title was a direct quote from Act 5, Session Laws of Hawaii 1995.

The motion failed with Mr. Hochberg and Ms. Sheldon voting aye and Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay. Mr. Britt abstained.

Dr. Stauffer felt that the Commission needs to address international implications, federal implications, and other states' implications, and Hawaii Administrative Rules and Hawaii Political Subdivision (referring to the four major counties) Ordinances and

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10. Give citation on supremacy of general Hawaii law over county ordinances.

Administrative Rules. He stated that the purpose of this particular draft proposal is to apprise the legislature that the Commission is aware that there are international, federal, etc. benefits and implications, but that it is beyond the Commission's scope to precisely list all of them. He added that the material can be used in an applicable format (a sentence, footnote, appendix, etc.).

Ms. Sheldon spoke against the motion. She questioned statements that inferred that the federal government would recognize same-sex marriages just because a marriage certificate was conferred by a state. She added that it has not been determined that the federal government would recognize such relationships for purposes of federal law and that the State of Hawaii has no power to directly or indirectly confer federal benefits. *Ms. Sheldon also stated that earlier expert testimony indicated a good chance that the same-sex relationships may fall within the exceptions to the full faith and credit clause and may not be recognized by other states.*

Dr. Stauffer responded that benefits under federal law are driven by a couple's marital status as determined by state law. He stated that the federal government does not issue marriage certificates but issues benefits based on marriage certificates from the states. He added that certain federal laws grant benefits to married couples, specifically heterosexual couples; and some laws that do not specify that the couple be heterosexual. He referred to Dr. Roth's statement *that* said that there may be some federal benefits, driven by the states' issuance of marriage certificates. He added that the law review article relating to the Full Faith and Credit clause ("*Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages,*" by Joseph W. Hovermill, *Maryland Law Review*, 1994, Vol. 53, p. 450-493), which had been distributed to the Commission on October 25, 1995, suggested that several states would have to adopt or recognize Hawaii's certificates unless specific legislation was passed against it. Dr. Stauffer emphasized that this was a rough draft and how staff incorporates it into the report can be settled later.

Mr. Hochberg spoke against adopting the motion. He recalled that, because of time constraints and lack of resources, the Commission would not focus on international or federal laws. It was his understanding that the Commission would concentrate on the HRS. He opined that it was beyond the scope of the Commission to address federal, international, or interstate laws and felt it would be best to be silent on those issues.

Chair Gill explained that the memorandum simply informed the legislature that the Commission is aware there are federal, international, and interstate implications.

*In speaking against the motion, Mr. Hochberg called the Commission's attention to the fact that Professor Roth also said that in his opinion he didn't think the feds were going to buy domestic partnerships from Hawaii, particularly if they co-exist with marriage.*

*Mr. Hochberg stated that the "findings" keep coming up concerning major legal and economic benefits despite the fact the we don't have a definition. Further, as Mr. Van Dyke informed the Commission, pursuant to the Dred Scott decision, one state cannot legislate*

*another's reality. Finally, Mr. Hochberg pointed out that he understands that the Chair, at the outset, stated that we would not be addressing these issues.*

Mr. Hochberg moved to amend the proposed draft to remove the phrase "the Commission finds..." everywhere it appears. His rationale for the amendment was that the Commission had not done that kind of research. Ms. Sheldon seconded the motion.

Dr. Stauffer called for the question and the motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye. Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted nay.

Dr. Stauffer then called for the question on his original motion which was to adopt "the following non-HRS benefit treatment be adopted by the Commission, subject to later review and amendment as appropriate. The treatment is discussed in pages 1 through 5 of Memorandum No. 3 and refers to international, federal, and other states' implications.).

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Ms Kreidman asked how the minority would be drafting their report.

Ms. Sheldon expressed her opinions regarding the Sunshine Law. She felt that not being able to meet and discuss Commission matters outside the meetings makes it impossible to make any deadlines and to confer. She added that even federal courts allow you to confer before filing a motion to compel discovery and felt the Commission should challenge the Attorney General Opinion.

Mr. Gill agreed that the Opinion was troublesome but that the Commission had to abide by it.

The members discussed the basic format of the final report to the Legislature and Ms. Martin said that based on the information she has obtained so far, she has basically been trying to describe what the Commission has discussed but has left open in each issue, what the majority and minority opinions decide. She offered to draft both a majority and a minority report that could be examined and commented on by both sides of the Commission.

Dr. Stauffer suggested that Ms. Martin could possibly draft a report that integrates both majority and minority views, as Congress does, or use the judiciary's system that includes the majority's view and dissenting opinions.

Ms. Sheldon then said that it appears a minority report will be in order. She added that if the Commission fails to cooperate and tries to manipulate the language of the minority, she would file a separate minority report written to say "what I want it to say." She also stated that her First Amendment right allows her to do so.

Ms. Martin advised the Commission that all members have the privilege of reviewing and commenting on a minority position, statement, or opinion and added that the comments made should be shared as well.

Dr. Stauffer acknowledged Ms. Sheldon's concerns, that the Commission could possibly vote down her motions on what she wants included in the report. *One solution could be a "minority caucus" meeting.* It was his understanding that subcommittees could be formed, with as little as two persons. He said that these subcommittees could call meetings, with the concurrence of the Chairperson and *with the understanding* that the meetings would have to be noticed seven days in advance, be open to the public and media, and could be held anywhere. He suggested that this would *comply with* the Sunshine Law.

Ms. Kreidman wanted it recognized that there would not be seven reports.

The Commission recessed at 9:55 a.m. and reconvened at 10:02 a.m.

Mr. Hochberg moved to amend Proposed Draft No. 3, page 3, at the end of the section on federal implications by adding a paragraph that reads:

The Commission also finds that since 1977, Congress has voted twenty-six times against homosexual rights.

Chair Gill ruled Mr. Hochberg out of order because the motion had already been adopted but suggested that if he had a separate idea he would like to express, he could do so in a separate motion *when the Commission gets to Mr. Hochberg's section.* Mr. Hochberg maintained that since the proposals were open for changes, he wished to add that paragraph. Ms. Sheldon seconded the motion and Mr. Hochberg called for a vote.

Chair Gill stated that he had ruled Mr. Hochberg out of order and questioned whether he was appealing the ruling of the Chair. Mr. Hochberg stated that there was a second to the motion and that the Chair could handle it in whatever manner he pleased.

Chair Gill clarified that Mr. Hochberg was appealing the ruling of the Chair, that the Commission will not revisit a measure once it has been adopted.

Mr. Hochberg reiterated that his motion was to add a paragraph to Memorandum No. 3, page 3, at the end of the section on federal implications.

The Chairperson ruled that the draft had already been accepted under the conditions proposed and that members are given the right to make any changes or suggestions and will be given that opportunity and therefore the amendment was not appropriate.

Dr. Stauffer offered that Mr. Hochberg could ask the Commission to adopt two paragraphs as the expression of the Commission and that the suggestions could be included in the proper place in the draft report.

Ms. Kreidman requested that the process of amending the report be clarified since the members had been given that privilege.

Mr. Hochberg said his problem up to this point is that he has been told that it is not the time to make changes and felt that this was the appropriate time to make amendments.

Chair Gill told Mr. Hochberg that the Commission was reserving his rights to make those motions as part of his suggestion to be included in a particular section of the report. *Mr. Gill told Mr. Hochberg that "we don't go forward and then go back. It's a way of wasting time." Mr. Hochberg replied that "we could just deal with it here and you guys could vote it down.*

*Mr. Gill stated: "You put it in good shape, let everybody take a look at it and then when your time comes to put your suggestions, and so forth."*

Mr. Hochberg then appealed the ruling of the Chair with respect to adding a paragraph, at the end of the section on federal implications, which paragraph would have read: "The Commission finds that since 1977, twenty-six times the U.S. Congress has voted against extending various rights to homosexuals."

A vote was taken on the Chairperson ruling Mr. Hochberg out of order because Memorandum No. 3 had already been adopted. The ruling passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

Mr. Hochberg then moved that a paragraph be added at the end of page 5 of Memorandum No. 3 that states: "This Commission also finds that twenty-three states have laws which criminalize sodomy." Ms. Sheldon seconded the motion.

The Chairperson again ruled Mr. Hochberg out of order for the same reason (that the proposal had already been adopted). A vote was taken on the ruling of the Chair and passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

#### **Memorandum No. 5**

Dr. Stauffer then referred to Memorandum No. 5 dealing with intangible benefits. He moved that the treatment of intangible benefits be adopted subject to later review and amendment as appropriate. Mr. Britt seconded the motion.



## **"Major Legal and Economic Marriage Benefits Extended to Opposite-Gender Couples, But Not To Same-Gender Couples"**

### **Intangible Benefits<sup>11</sup>**

The legal benefits that are often closest to the hearts of affected couples that are denied the right to a marriage certificate are what might be called "intangibles."<sup>12</sup> For example, there is the statutory right to visit a spouse in the hospital.<sup>13</sup> Certainly, to be denied the right of access to a beloved spouse, with little time to live after some medical emergency, all because there is no government marriage certificate, can be heartrending.

If the hospital's decision in such an example was in error (and a valid marriage certificate was eventually produced), it is easy to envision a lawsuit over the pain and suffering caused to the surviving spouse. In such a case it is easy to envision a jury computing the economic value of such a denied marriage benefit, and making an award in the hundreds of thousands of dollars.

The Commission finds, however, that outside of such jury deliberations, it is very difficult if not impossible to place a monetary value on each of these intangible benefits that, in reality, probably are priceless pieces of our very humanity.

Two more examples include the right of a legal spouse to decide whether a deceased partner's physical remains should be donated to science or for transplants,<sup>14</sup> and the legal spouse's right to decide the final disposition of the deceased's remains.<sup>15</sup>

Disposition of remains in a manner other than the form desired by a legal spouse or guardian resulted in one Hawaii jury award that placed the value of this spousal right at several hundred thousand dollars.<sup>16</sup> The specific right to allow for (or deny) the donation of organs treads on the topic that some religious traditions view as mutilation of corpses; history teaches that so intrinsically valuable is this right that wars have broken out over its violation.

Yet another example is the Federal government's policy of waiving the normal decades' long waiting list for immigration for members of a citizen's family, including a legal spouse who is a foreign citizen. In this case, current Federal law would give preference to the immigration into the U.S. of a foreign citizen who is the spouse of a

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11. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage[;] Revised Testimony Before [The] Commission on Sexual Orientation and the Law, State of Hawaii." September 27, 1995 as revised October 5, 1995. Mss, 9 pages.
  12. List the affected statutory sections from Appendix A.
  13. Give citation.
  14. Give citation(s).
  15. Give citation(s).
  16. Cite the court case; estimate the value if it is available (the award included the cost of having to place some newspaper advertisements, and so the value may not be known...).

U.S. citizen (provided the U.S. citizen economically "sponsors" the foreign citizen), but only if the couple has a certificate. What value can be given to being able to live together with your spouse, one of the most fundamental of marriage benefits?

The Commission finds that in purely economic terms, many of these "intangible" benefits have the desirable feature that they often do not impose economic costs on other people. The Commission further finds that these "intangible" legal/economic benefits have a substantial but intangible economic value.

The Commission further finds that beyond the specific intangible benefits listed above is one other than 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?<sup>17</sup> 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?<sup>18</sup>

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."

Mr. Hochberg moved to amend the draft proposal in Memorandum No. 5 to add the word "salient" wherever the phrase "major, legal and economic marriage benefits" appears so that it would read "salient and major legal and economic marriage benefits." Ms. Sheldon seconded the motion.

Mr. Hochberg explained and Ms. Sheldon agreed, that the definition which was adopted in Memorandum No. 2 used the word "salient", it would be consistent to do so here.

A vote was taken on Mr. Hochberg's motion and failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

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17. Give the case's citation. (Also ensure the name is given correctly in the text.)
  18. Give court citation. (Also ensure name is given correctly in the text.)

Dr. Stauffer explained Memorandum No. 5, relating to intangible benefits. He stated that there are certain legal benefits of marriage which are "closest to the heart" of affected couples but are intangible in the sense that it is difficult for an economist to put a "price tag" on it. His example was a situation of a couple married by a church that recognizes same-gender marriages but who does not have a legal marriage certificate. He explained that if one spouse were admitted to a hospital, the other spouse may not be allowed to visit the spouse because he or she may not be a certified spouse. He added that the law states that the hospital must allow legal spouses to visit. He further explained that a jury could possibly give it an economic value but for the Commission to attempt to do so would be "reducing something that is very human into dollars and cents." He concluded that these intangible benefits have value but that the Commission should not place a precise economic value on them. Dr. Stauffer said that same-gender couples repeatedly state that one important reason why they wish to be married is because of these types of intangible benefits. He suggested that these intangible benefits be listed first and that Ms. Martin cite them.

It was Mr. Hochberg's understanding that if you are conscious when entering a hospital you can allow anyone to visit you. He added that if you are unconscious before entering, many things could have been done beforehand, such as durable powers of attorney, living wills, etc., that would not permit the hospital to exclude certain visitors.

Ms. Kreidman stated that people do not expect to get into accidents and as a reflection of the general populous, many do not have durable powers of attorney, living wills, etc. She added that she is aware of situations where partners have not been able to have access to their "loved ones" because of family preferences or hospital interference.

Dr. Stauffer added that the benefit granted by state law is that an opposite-sex, married couple does not need to write a durable power of attorney, or does not need to contact every hospital in the State to give permission for a spouse to visit; it is just automatic.

Mr. Hochberg said that the Commission was not asked by the Legislature to find major legal or major economic benefits, but was asked to find major legal and major economic benefits. He continued that if the benefit does not have a major economic component to it, it is outside the scope of the Commission and should not be included in the report.

Dr. Stauffer stated that he did include both legal and economic benefits and referred to two other paragraphs of his memorandum that state in part: "...outside of such jury deliberations, it is very difficult if not impossible to place a monetary value on each of these intangible benefits that, in reality, probably are priceless pieces of our very humanity."

Ms. Sheldon addressed the issue and referred to the last paragraph on page 2 of the memorandum and stated that the content was incorrect and that the federal government specifically does not permit the immigration of same-sex couples, even from countries that recognize domestic partnerships, such as Denmark.

Dr. Stauffer stated that when he wrote the memorandum, he was relying on Dr. Roth's testimony which included this benefit. Since then, he has become aware that the Ninth

Circuit Court of Appeals, in a Colorado case, interpreted the federal law as saying it does not apply. He agreed that this paragraph may have to be amended but he would stand by what he wrote as of October 6 but would mention the Ninth Circuit case.

Mr. Hochberg said that his interpretation of the case was that what the Colorado court said was exactly what our Supreme Court rejected, which is that marriage may not exist between two people of the same sex because the definition of "marriage" is people of opposite sex. He added that it had nothing to do with any defect of issuing the license. He further added that the Ninth Circuit Court of Appeals ruled that for immigration purposes, the couple was not married. Mr. Hochberg suggested deleting the paragraph now but to possibly include it after clarification.

Ms. Kreidman said that since the procedure for amending the memorandum was not clear, she would support Mr. Hochberg's suggestion.

Dr. Stauffer then rephrased the motion to delete that one paragraph and any footnotes attached to it with the possibility of including it later.

Mr. Hochberg referred to the concept starting on page 3 and stated that our society does not grant "carte blanche" human liberty, but is defined by instances where human liberty is restricted. He added that if the Commission is inferring ultimate human liberty, then any type of marriage ceremony, or lack thereof, would not be required. He stated that heterosexual couples do not experience complete human liberty with their right to be married. They cannot marry persons of a certain age, persons related within a short bloodline distance, persons already married, etc. He urged that this is not an argument the majority should make because it totally lacks merit and a view of reality.

Dr. Stauffer begged to differ and referred to the last paragraph of the memorandum that states in part: "...the Commission finds that this intangible idea of 'being really married' through governmental certification -- the intangible idea itself-is one of the primary 'benefits' associated with legal marriage in the minds of most members of the general public." He added that many, all over the political spectrum and particularly the religious right people testified that there was "something" to marriage.

Ms. Sheldon asked Dr. Stauffer if he was inferring that the Commission was leaning toward something more than domestic partnerships. She stated that Memorandum No. 5 speaks to marriage rather than domestic partnerships.

Dr. Stauffer replied "yes", this particular section speaks to the idea and the status of being married as a major intangible benefit.

Mr. Hochberg then referred to the second full paragraph on page 3 and stated that it put into perspective what Memorandum No. 5 proposed to do. He questioned whether the majority of the Commission realized that it was going far beyond the scope of Act 5. He added that the only reason it was "hooked in" was because of a "liberty hook" and if this is the perspective that the majority is going to take he suggested that the members be honest

and recommend to the Legislature that chapter 572, HRS, be repealed and get the State out of the "marriage business."

Dr. Stauffer said that it was not his intent to abolish chapter 572. He then called for a vote on his original motion and added that he voluntarily removed the paragraph that begins on the bottom of page 2, relating to immigration of same-sex couples. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer stated that Memorandum Nos. 6, 7, 8, 9, 10, 11, and 12 flow together, are numbered internally, and attempt to cover fourteen areas of substantial major benefits that are all connected. He then moved that the text contained in Memorandum Nos. 6 through 12 be adopted, subject to editing and amendment later.

Chair Gill suggested that the Commission be given the chance to review and consider all fourteen different benefits individually.

#### **Memorandum No. 6**

Dr. Stauffer then withdrew his motion and referred to Memorandum No. 6, page 1.

Mr. Hochberg moved "to table voting on the memorandum because the Commission had not finalized the minutes of October 11, 1995, that included Dr. Ghali's response to Dr. La Croix's economic analyses on which the memorandum are based and consequently, the minutes do not reflect what occurred and since what occurred is ostensibly what these memorandum are based on, until the Commission resolved the question on the matters in the minutes." Ms. Sheldon seconded the motion and Mr. Hochberg called for the vote.

The motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Dr. Stauffer moved to adopt Substantial Benefit No. 1 as contained in Memorandum No. 6, subject to later review and amendment as appropriate. Mr. Britt seconded the motion. Specifically, the motion reads:

#### **Substantial Benefit No. 1: Spousal/Dependent-Support Benefits**

The Commission finds that if recognition and equality is the top benefit from governmental certification, and the one perhaps most commonly thought of by the general public, a close second is this package of benefits that are made available usually to one spouse (and any children) through the government's enforcement of the certificate's contract language.

That is to say, by the couple agreeing to the terms of the marriage partnership, as contained within the government certificate, they are each agreeing to support the other spouse (and any children).

The Commission also finds that for this package of benefits, including such things as spousal support, the government contributes little of the economic value of these benefits. Further, that government costs for this package consist largely of subsidizing the family court and other judicial avenues open to an economically weaker spouse (and children) to enforce the payment of benefits by the economically stronger spouse.

The Commission further finds that these benefits are not therefore made available directly by the government to a certified spouse (or the children). Instead, the direct benefits are paid by the economically stronger spouse. But these payments are indirectly made available by the government through its providing for enforcement of these support laws that come into effect by the couple getting their government certificate.

The Commission also finds that to many members of the general public, this package of benefits are also known as the central commitments that are at the heart of the social institution of marriage. When a person gets sick, instead of the government being the first caregiver consulted, we look to the person's spouse (and this applies whether the person getting sick is the economically weaker or stronger of the two). The same applies to both spouses if we see children getting sick or needing support.

The Commission also finds likewise, that if a couple separates but does not divorce, we look first to the economically stronger spouse to provide spousal support to the economically weaker spouse and any children. And if a couple does divorce, we look to the economically stronger spouse to provide for the economically weaker spouse and the children.

In addition, the Commission finds that while certified couples (and children's advocates) do not always have to appeal to the government to enforcement these support laws, just knowing that the laws are in place and capable of enforcement is a strong inducement to the one spouse to support the other and for the two spouses to support the children.

Therefore, the Commission finds that having these laws in place not only provides a first-line of individual support for society's most vulnerable citizens, but also provides an incentive that shows up in the extraordinary level of longevity, responsibility, and commitment seen in the certified marriage bond that are not seen in the bonds of many informal cohabiting couples. i.e., even with the high divorce rate, legal marriage enjoys a higher degree of longevity, responsibility, and commitment than non-legal marriage or unmarried couples' relationships.

The Commission also finds that the spousal-support laws and closely connected to the children-support laws. In short: the marriage certificate provides legally enforceable commitments between the spouses but also between them and their children. Hence, by supporting legal certification, the government and society as a whole are benefited by attempting to help ensure proper support of the weaker spouse, and we are also benefitted by attempting to ensure proper support for the procreation and raising of children.<sup>19</sup>

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19. How child-support laws can benefit procreation is an indirect process. In short, by providing enforceable parent-support laws for children, the government creates an economically safer environment for an economically weaker spouse to agree to have a child.

Therefore, the Commission finds that government and society are harmed by denying married spouses and their children these benefits. The married spouses, their procreation of children, and their existing children are all likewise harmed.

The Commission also finds that the precise economic analysis of these benefits is difficult because of the number of variables involved. i.e., every couple, every child, every spousal-benefit case, and every divorce-decree is different. Still, we have the Hawaii Supreme Court's listing of benefits within this package.

The Commission takes note that of the 14 "most salient" government-certificate benefits, six were from this single category of spousal/dependent support:<sup>20</sup>

- \* The control, division, acquisition, and disposition of community property under Chapter 510, HRS.
- \* The rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, Chapter 560, HRS, (i.e., amongst other benefits, the fact that many people don't leave wills, and the law then provides for the distribution of the estate to the certified spouse and children).
- \* The award of child custody and support payments in divorce proceedings under Chapter 571, HRS.
- \* The right to spousal support pursuant to §572-24, HRS.
- \* The right to file a nonsupport action under Chapter 575, HRS.
- \* Post-divorce rights relating to support and property division under Chapter 580, HRS."

Dr. Stauffer summarized Substantial Benefit No. 1, Spousal/Dependent-Support Benefits. He gave an example of a married heterosexual couple and explained that if the stronger economic partner moved out, the weaker economic partner could sue for support. Dr. Stauffer said he presented this scenario to Dr. La Croix who replied that *technical economics perspective* there was no benefit, *because* as far as the marriage was concerned, *the benefit/burden* was all internal, between that couple, *and so* there was no *net* economic benefit *the couple as a whole*. Dr. Stauffer stated that he disagreed with Dr. La Croix and Dr. Ghali, who also believed there was no economic value, *insofar as he felt there was a benefit if not to the couple as a whole then to at least one member of the couple*. Dr. Stauffer agreed with the Supreme Court and added that six of the fourteen "most salient" *marriage benefits* listed by the Supreme Court *are these* divorce, dependent support, alimony, *etcbenefits*. He further added that many would consider divorce to be a burden *but also a benefit to the spouse receiving alimony, etc*. He requested that staff included the precise statutes in the final report.

Ms. Sheldon asked if members of the homosexual community were seeking either a domestic partnership and/or same-sex marriage so that they can be together and obtain the benefits that married heterosexual couples receive, have their love for one another

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20. The following six benefits are from Baehr v. Lewin, 74 Haw 560-1 (1993).

recognized, have the status of being married and one of the benefits of marriage is the benefit of getting divorced.

Ms. Kreidman described marriage as being a commitment, obligation, and regard to one's intimate partnership. It was presumed that marriage bestows additional costs as well as benefits.

Ms. Sheldon concluded that adopting a law that would legalize these unrecognized relationships, such as common law and same-sex marriages, would be a great cost to society.

Mr. Hochberg found that this meeting had brought a shift in discussion on same-sex couples. He observed that up to this point the Commission has described same-sex couples in long-term relationships desiring the benefits of marriage. He commented that the Commission has suddenly shifted toward a discussion on a "fail safe" net for failed relationships.

Dr. Stauffer noted that Memorandum No. 6 was dated October 6, 1995, and there was not a major shift in discussion and the memorandum does not mention failed relationships.

Mr. Hochberg recommended that if the majority adopted Memorandum No. 6, the Legislature should be notified of the deviation of the description of what the Commission has been working on up to this point.

Chair Gill called for a vote and Mr. Hochberg moved to amend the motion to include the word "salient" wherever the phrase "major legal and economic benefits" occurred. Ms. Sheldon seconded the motion and Mr. Hochberg called for the question. *Mr. Gill stated: "We're going back to make another dance here. If I could have the Commission's attention, the motion is to insert the word "salient" in all the particular spots in Benefit No. 1."*

The vote was taken with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

The vote was then taken for the adoption of Substantial Benefit No. 1 in Memorandum No. 6. Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye and Mr. Hochberg and Ms. Sheldon voted nay.

### **Memorandum No. 7**

Dr. Stauffer moved to adopt Substantial Benefit No. 2 in Memorandum No. 7. *Mr. Gill asked Dr. Stauffer to explain Substantial Benefit No. 2 which Dr. Stauffer agreed to explain, "if there was a second." Whereupon the motion was seconded by Ms. Kreidman. Specifically the motion reads:*



## Substantial Benefit No. 2: Health Insurance Benefits

The Commission making the following findings, as contained in this section:

The Hawaii Prepaid Health Care Act<sup>21</sup> mandates that private employers provide a minimum package of health insurance benefits to employees who work more than 20 hours per week. The law allows an employer to charge the employee up to 1.5% of the employee's wage or salary as payment towards the health insurance premium.<sup>22</sup> For most workers, even if this amount is withheld from their salaries, the portion contributed by the employer is still substantial. By tradition, most employers in Hawaii pay all of the insurance premium, a substantial benefit.

A parallel law<sup>23</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>24</sup> Traditionally, employees do make a partial-contribution towards the insurance cost, but the employer's contribution is still substantial.

The law for private employers does not require that the health insurance coverage be provided to workers' legal spouses or dependents.<sup>25</sup> Still, almost all private firms provide this added coverage. Often the premium for this added coverage is not subsidized by the employer, but the payment amount is still substantially below getting the insurance privately because of reduced rates by going through the employer's plan; as such, this represents a substantial benefit. While private employers may voluntarily extend this benefit to non-legal spouses, this has generally not been the tradition in Hawaii. Therefore this substantial benefit is limited to legal spouses (and children), and constitutes a "marriage bonus." The precise amount of the bonus is set by various insurance plans, which are adjusted from time to time, and by the amount (if any) which the private employer contributes to the added insurance cost.

Most private employers provide the spousal benefit with the condition that if the spouse is already covered, that the only insurance benefit given would be for those medical expenses which are not already covered by the spouse's plan. If the spouse is not working, then full coverage would be given, with less coverage if the spouse is working or otherwise has some coverage. Assuming the spouse is not working and so gets coverage through the other spouse's employer, and assuming the employer contributes nothing to the cost of the spouse's policy, then one estimate of the savings to the married couple is \$1,251.48 in saved costs by going through the employer's plan.

Public employers, on the other hand, are mandated by law to provide certified spousal health benefits, and further to contribute a minimum amount towards these

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21. Give citation.

22. Give citation.

23. Give citation.

24. Give citation.

25. Give citation.

costs (final agreement on the amount of subsidy is set by collective bargaining).<sup>26</sup> The "spousal benefit" is therefore at least \$1,251.48 if the spouse did not work (i.e., the savings of going through the employer), and more if the employer's contribution is factored in (the employer's contribution varies under the various collective bargaining agreements with the different unions and categories of public employees). In any case, the "marriage bonus" is a substantial amount.

A similar benefit is mandated for public employers to be provided to dependent children, another bonus.<sup>27</sup>

Dr. Stauffer explained that Substantial Benefit No. 2 relates to spousal health insurance benefits primarily for public employees but also refers to private employees. He added that page 3 of the memorandum also mentions the possible value being \$1,251.48 but would vary case-by-case.

Mr. Hochberg moved to table the motion until the approval of the minutes of October 11, so that the members could review the comments of economists Dr. Ghali and Dr. La Croix. Ms. Sheldon seconded the motion and Mr. Hochberg called for the question.

The vote to table the motion was taken and failed to pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

*A discussion ensued between Mr. Hochberg and Dr. Stauffer concerning the health insurance benefits.*

Mr. Hochberg then referred to the second sentence of the second full paragraph of Substantial Benefit No. 2. He asked Dr. Stauffer where he obtained the information that "almost all private firms provided this health insurance for spousal added coverage."

Dr. Stauffer stated that it had been his private experience and his study of the market and believed the information was also contained in Dr. La Croix's testimony. *Dr. Stauffer said he would get the source of the information for us. Mr. Gill stated that perhaps Dr. Stauffer could give it to Mr. Hochberg for review. Mr. Hochberg voiced concern that in the meantime that information would be left in the report as truth, stating: "That's the trouble with the conduct of these proceedings." After further discussion, Dr. Stauffer agreed to have the sentence read: "Still, almost all private firms provide access to this added coverage (citation to be supplied)."*

Ms. Sheldon requested, whatever action is taken, that her right to discuss the matter further be preserved.

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26. Give citations on these two or three things.

27. Give the citation.

Dr. Stauffer again reminded the Commission that the motion is subject to later review and amendment.

Mr. Hochberg then referred to the first full paragraph on page 3 of Substantial Benefit No. 2 of Memorandum No. 7 that reads: "...The 'spousal benefit' is therefore at least \$1,251.48 if the spouse did not work (i.e., the savings of going through the employer), and more if the employer's contribution is factored in (the employer's contribution varies under the various collective bargaining agreements with the different unions and categories of public employees)...." He then referred to Dr. Ghali's interpretation of Dr. La Croix's figures and said that it was an expected value, but not the real value. Mr. Hochberg opined that the real way to analyze any of these benefits is to say that the \$1,251.48 is an expected value that must be multiplied by the likelihood of the use of this benefit. He perceived, that without the benefit of Dr. Ghali's analysis, the economic evaluation in the paragraph was incorrect and would be misleading to the Legislature.

Dr. Stauffer contended that the statement in his motion was more factual than Mr. Hochberg's and if Mr. Hochberg disagrees, he could express his evaluation in the minority report.

Mr. Hochberg urged the Commission not to have misleading information in a report to the Legislature that must be corrected by a minority report. Ms. Sheldon agreed.

Dr. Stauffer said that his statement was not misleading but instead was the truth.

Chair Gill called for a vote on Substantial Benefit No. 2, Memorandum No. 7 and was adopted with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye. Mr. Hochberg and Ms. Sheldon voted nay.

Dr. Stauffer then moved to adopt Substantial Benefit No. 3, Other Insurance Benefits, subject to later review and amendment as appropriate. Ms. Kreidman seconded the motion. The motion specifically reads:

**Substantial Benefit No. 3: Other Insurance Benefits**

The Commission finds that partially by tradition, and partially by legal mandate,<sup>28</sup> insurers in Hawaii have granted certified families discounts for various types of insurance.

This is thought to 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.

Dr. Stauffer reviewed *these* two paragraphs which briefly state that insurers in Hawaii traditionally grant certified families premium discounts for various types of insurance,

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28. Give citations.

including life, auto and private disability. He added that there are articles that discuss these types of insurance and how same-gender couples are penalized. He further added that staff has found certain mandates within the insurance chapters of the HRS which appear to have a connection with this and believes these citations should be listed in the report. Dr. Stauffer pointed out that *in his opinion* while the words used in the two paragraphs are somewhat *cautious*, it points out that *the matter* is an important benefit.

Ms. Kreidman suggested the sentence be clarified to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Mr. Hochberg referred to Ms. Martin's list of HRS sections, that confer marriage benefits. Ms. Martin clarified that although she takes full responsibility for the interpretation, some of them may not be hers but she would try to explain them.

Mr. Hochberg then specifically referred to section 431:10-203 which states: "...it declares a minor competent to contract for life or disability insurance on the minor's own life for the benefit of the minor or the minor's spouse." He questioned whether under this "new regime" the Commission was proposing that minors be allowed to marry without parental consent.

Dr. Stauffer replied, "obviously not", and reiterated that the subject is exceedingly complex but he has attempted to "boil it down" to two paragraphs.

Mr. Hochberg then referred to section 431:10-206, insurance contracts, which allows one spouse to contract for life or disability insurance without the consent of the insured spouse.

Ms. Sheldon stated that anyone could purchase a policy and insure whomever they pleased.

Dr. Stauffer gave the example of the premium for auto insurance for a married couple. He stated that although there are many other variables, insurance companies traditionally give a reduced premium to a spouse versus two individuals. He added that this appears in testimony from 1995 and literature that is included in the bibliography (under law review articles).

Mr. Hochberg again referred to the HRS list of benefits and stated that there are fourteen insurance sections that cover insurance contracts, health insurance, credit insurance, auto insurance, and life insurance. He said that none of the blurbs address a decrease in premiums for anyone.

Ms. Martin then pointed out that section 431:10D-212, and said that being able to participate in a "group life insurance" plan is an example of a benefit. She explained that the section allows the extension of discounted group life insurance policies to spouses and dependent children. She confirmed that the definition used when interpreting the list of HRS sections was "any improvement in condition or status that arises out of being married, or

being a spouse, or being a family." She added that a same sex partner would not be extended that group policy.

Mr. Hochberg disagreed and remarked that whether a same-sex partner were working or not, the benefit would be free, under state law referring to the State Quest health program.

Dr. Stauffer then agreed to Ms. Kreidman's suggestion to reword the first paragraph of Substantial Benefit No. 3 to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Mr. Hochberg again expressed his concern about submitting a report to the Legislature that included misleading information.

Ms. Kreidman responded that because drastic cutbacks to access to entitlements is occurring, more people will be affected. She added that if the Commission has "an opportunity to provide insurance to someone who might not otherwise have it, they deserve it too."

After discussion on the procedure for making motions, *which included discussion by Ms. Sheldon, in her opinion, of Mr. Gill's continuing refusal to treat Mr. Hochberg with the same courtesy and privilege extended to other Commission members*, Mr. Hochberg moved to amend Substantial No. 3 by deleting the two paragraphs in its entirety and replacing it with Ms. Kreidman's comments which were: "Are you aware of the drastic cutbacks in access to entitlements that's taking place right now? Now that's going to affect more and more and more people. I don't think it is safe to say that everybody is either in this category or that category and if you are in this category you get insurance and if your in that category you also get insurance. It simply doesn't work that way. What we're trying to do is to say if we have an opportunity to provide insurance to someone who might not otherwise have it, the deserve it too."

The motion failed to pass with with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay. Mr. Hochberg and Ms. Sheldon voted yes.

Dr. Stauffer then agreed to Ms. Kreidman's suggestion to reword the first paragraph of Substantial Benefit No. 3 to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Dr. Stauffer clarified that Substantial Benefit No. 3 deals with life insurance, auto insurance, private disability insurance, not public disability, not HMSA disability, not workers' compensation, not TDI, but private, additional disability insurance that one can purchase aside from TDI, etc.

A vote was taken on Dr. Stauffer's original motion to adopt Substantial Benefit No. 3, as amended. The motion carried with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

Ms. Sheldon then formally requested a verbatim excerpt of the tape, in writing, of what Ms. Kreidman said: "Are you aware of the drastic cutbacks in access to entitlements that's taking place right now? Now that's going to affect more and more and more people. I don't think it is safe to say that everybody is either in this category or that category and if you are in this category you get insurance and if *you're* in that category you also get insurance. It simply doesn't work that way. What we're trying to do is to say if we have an opportunity to provide insurance to someone who might not otherwise have it, they deserve it too."

Mr. Hochberg moved that the complete written testimony by Daniel P. McGivern given at the previous meeting be put in its full context in the minutes of prior meeting and again in the current meeting by this motion. The motion was seconded by Ms. Sheldon.

Ms. Martin explained that, for administrative purposes and the reporting rule under the Public Information Act, all written testimonies have been attached to the minutes.

Dr. Stauffer *then* cited a section of chapter 92 which, *in his opinion*, states that commission members have the right to insert items into the minutes and *that he would* vote in favor of the motion.

*In response to an inquiry from Ms. Kreidman*, Mr. Hochberg reasoned that Mr. McGivern's testimony was very perceptive and wanted it included in the text of the minutes. He called for a vote but was assured by the Chairperson that it would be included.

The following is Daniel P. McGivern's testimony given on October 25, 1995.

When a person appears before a legislative body or a commission, it is expected that the members on the body are at least interested in what will be said. But this commission really isn't.

If 1,000 people testified against same-sex marriage and against domestic partnership laws, and only one person testified in favor, that person would have his or her view upheld by this commission.

This commission is not objective. It is a sham, a shibai, a fraud perpetrated on the public. The outcome of the commission's voting on whether marital benefits should be extended to homosexual and lesbian couples has been known since the commission was first appointed.

The real purpose of this commission is to hand a favorable report to the legislature, leading to a domestic partnership law in the next legislative session.

However, a domestic partnership law, which recognizes gays as a special class, will inevitably lead to same-sex marriage.

It is said that this commission does not truly represent the community. This is the first time I've ever appeared before a body, knowing that what I and others have to say makes no difference.

If anything is said that is contrary to furthering the homosexual-lesbian agenda, it will be disregarded by the majority of this commission.

### Memorandum No. 8

Dr. Stauffer moved that Substantial Benefit No. 4, Retirement Benefits, report be adopted by the Commission, subject to later review and amendment as appropriate. Ms. Kreidman seconded the motion. Specifically, the motion reads:

#### **Substantial Benefit No. 4: Retirement Benefits<sup>29</sup>**

The Commission makes the following findings, as contained in this section:

Retirement benefits are required by law for public workers of the four Counties and also for the State.<sup>30</sup> Retirement benefits for private workers are not required by law, but are fairly common in Hawaii.

A full examination of private-sector retirement benefits that include a "marriage bonus" is beyond the scope of this report, though it is understood that this bonus exists in private-sector plans and represents a substantial and common benefit.

Within the public-section (State and Counties) there are a number of retirement benefits, and this study will examine just two substantial benefits from this area. As private-sector retirement-benefit plans are often similar, an examination of these two public-sector retirement benefits can suggest what would be found of a separate examination of the private sector.

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.

##### **a. Retirement health insurance coverage.**

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/her comprehensive coverage.<sup>31</sup> One estimate of the value of this benefit is \$1,464 annually.

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29. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage; Revised Testimony Before the Commission on Sexual Orientation and the Law, State of Hawaii, September 27, 1995, revised October 5, 1995. Mss, 9 pages.

30. Give citations.

31. Give citation.

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 pre-deceases the spouse.<sup>32</sup> One estimate is that this benefit is worth \$553.20 annually. With plans currently occurring in Congress to raise the premium cost, and with the public employers committed to 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's 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. If identical to the public coverage, one estimate places the benefits at \$1,464 annually for spouses not covered by Medicare, and \$553.20 annually for those covered by Medicare.

#### **b. Retirement Death-Benefit Pension Coverage.<sup>33</sup>**

There are currently two public-sector pension plans, referred to as the "contributory" and "non-contributory" plans. Generally the former plan covered workers prior to the mid-1980s, and the latter plan covered most workers since that time. In general, a contributory plan means the worker contributes to the plan, whereas a noncontributory plan means the worker does not. In both cases the employer makes contributions.<sup>34</sup> The benefits are usually higher for a contributory plan as more payments have been made into it.

Over 90% of current public pensioners are on the contributory plan, whereas 72-74% of current workers are on the noncontributory 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 whoever 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>35</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 (and dependent children get an additional, smaller payment, up to the age of 18). If there was no legal spouse, then no payment is

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32. Give citation.

33. Shimabukuro, David. "Testimony of David Shimabukuro, Assistant Administrator[,] Employees' Retirement System of the State of Hawaii to the Commission on Sexual Orientation and the Law[,] September 27, 1995." Mss. September 27, 1995.

While the statements and findings of this sub-section 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.

34. Give citation.

35. Give citation.



made unless there are children (but payments to the children are much lower than to a legal spouse). If there are no children or legal spouse, then no payment is made. 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 the workers' estate or other heirs if there is no legal spouse or any children.<sup>36</sup>

The value of this "marriage bonus" is contained in various public documents and adjusted from time to time. It is a substantial amount of money.<sup>37</sup>

There is one exception to the above discussion about contributory members (i.e., those who generally have no "marriage bonus").

When the public worker is hired, he or she must name a "beneficiary". But that beneficiary may die and the employer has no method currently of finding out and asking the worker to name a new beneficiary. Often the worker fails to remember to do so, and so an "ordinary" death as above may occur where the named beneficiary has already died. In that case the employer will automatically pay all the death benefits to the spouse (and/or dependent children), and if there are none, to the workers' estate.<sup>38</sup>

This exception -- more common than might be supposed -- creates a "marriage bonus" for contributory members having "ordinary" deaths. Legal spouses would in these cases automatically get the death-benefits, as set by the employer from time to time, and which are substantial.<sup>39</sup>

The next type of death 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>40</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>41</sup>

For "ordinary" deaths, the death-payment is made to a designated beneficiary, which could be a legal spouse or not, therefore giving no special "marriage bonus". But for an "accident" death, the legal spouse gets a death-bonus whether or not the worker named the spouse as a beneficiary.<sup>42</sup>

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36. Give citations.

37. Give citation.

38. Give citation.

39. Give citation.

40. Give citation.

41. Give citation.

42. Give citation.

For example, if the worker named the legal spouse as beneficiary, then after an accidentally death, the spouse would get 100% of the benefits. But if the worker had named someone else, then that other person gets 50% of the benefit, and the legal spouse gets the other 50%.<sup>43</sup>

This is the only time when "spousal rights" enter the picture for contributory members' death-benefits. Even at 50% of the total value, the amount is substantial.

Also, as with the point above, a contributory member's death-benefit in an "accident" case will 100% go to the legal spouse (with additional payment to the children) if the named beneficiary has passed away and no new beneficiary was named by the worker.<sup>44</sup> This benefit, as described above, is substantial.

State law does not mandate death-benefit payments for private employees. Some private firms extend such benefits, sometimes to the surviving certified spouse (and children) and other times to a designated beneficiary. To the degree that the benefit is made available, and to the degree that it is limited to the certified spouse (and children), these private-sector benefits are substantial.

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 the tax penalty (through use of the IRA option) is an additional substantial benefit for legal spouses.<sup>45</sup>

Dr. Stauffer explained that Substantial Benefit No. 4 describes the retirement health insurance and death-benefit pension coverage for certified spouses of public employees. The memorandum was based on *the written testimony of David Shimabukuro, Assistant Administrator, Employees' Retirement System*. He further explained that the memorandum described the ramifications of ordinary death, accident on the job, etc. *for contributory versus noncontributory plan members*.

Mr. Hochberg moved to table discussion on Substantial Benefit No. 4 because the minutes of the October 11 meeting had not been reviewed or approved, that persons, other than Mr. Shimabukuro, had testified, and that Dr. Ghali's testimony had not be included or agreed upon for those minutes. He added that because there had been ex parte, subsequent communication with Mr. Shimabukuro for Memorandum No. 8, he should probably come back and readdress the topic, rather than having the Commission disregard what was heard. Ms. Sheldon seconded the motion.

The motion failed to pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

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43. Give citation.

44. Give citation.

45. Give citations.

Mr. Hochberg's recollection, without the benefit of corrected minutes reflecting what the consensus of the Commission recalled the testimony on the Employees' Retirement Systems (ERS) to be is as follows:

- (1) There was no benefit to being married because you can select your beneficiary (not addressed by Dr. La Croix).
- (2) Except in certain cases where a spouse can obtain additional pension if a contributory employee dies accidentally while in service. Dr. Ghali stated that because this situation happens infrequently, it may be considered insignificant and not a major economic benefit.

Mr. Hochberg's overall recollection was that the ERS yields little benefit to married couples that everyone else does not have.

Ms. Kreidman *inquired why oppose the principal* if the cost is so minimal?

Mr. Hochberg responded that because the Commission has not yet discussed whether it is appropriate to recommend to the legislature that they extend the same benefits to those who engage in homosexual sex as they do to those heterosexuals who choose to marry.

Dr. Stauffer commented that the memorandum reflects the three firm benefits (included in Mr. Shimabukuro's written testimony) based on having a marriage certificate and also includes benefits where beneficiaries can be designated. Dr. Stauffer clarified *some of the monetary figures* in his memorandum and referred for a citation to footnote 29 in these minutes which is the first footnote of Substantial Benefit No. 4.

*Mr. Hochberg stated that in his opinion Dr. La Croix backed away from his written paper when confronted with Dr. Ghali in the room and he recalls that Dr. La Croix admitted that he didn't do an economic analysis. Dr. Stauffer stated that was not his recollection. Mr. Hochberg believed that if the minutes of the October 11, meeting were finalized this issue could be resolved. Dr. Stauffer confirmed that we have Dr. La Croix's written nine-page testimony that has not been withdrawn.*

Ms. Sheldon requested that figures in the memorandum be cited. Dr. Stauffer agreed to footnote the figures.

*Mr. Hochberg and Dr. Stauffer discussed and disagreed on the evaluation of lump sum distributions, and ordinary and accidental death benefits. Dr. Stauffer said he stood by his interpretation.*

A vote was then taken on Dr. Stauffer's motion. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Hochberg moved to adjourn and the motion was seconded by Ms. Sheldon.

The Chairperson stated that the motion to adjourn was out of order and questioned whether Mr. Hochberg wished to appeal. He added that there were more items on the agenda that needed to be addressed and suggested that the members agree on a date and time to reconvene. The members decided to meet on Wednesday, November 1, 10:00 a.m.

**November 1, 1995**

Chair Gill reconvened the meeting at 10:07 a.m., November 1, 1995. All members were present.

**Substantial Benefit No. 5/Memo No. 9**

The Chair handed out a "Proposed Statement on the Economic Effect of Legalizing Same-Sex Marriage on Tourism in Hawaii" attached as Attachment 3.

Mr. Hochberg moved to amend the agenda to include public testimony at this continued meeting. The motion was seconded by Ms. Sheldon. The Chair stated that November 8, 1995 has a place for public testimony. Mr. Hochberg spoke in favor of his motion under the the sunshine law. Dr. Stauffer spoke against the motion stating that HRS does not allow amending of the agenda. Ms. Sheldon spoke in favor that we should consider the schedule of the person. Mr. Hochberg said the express language allows the public to speak at every meeting.

The motion to amend the agenda did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon moved to amend the agenda to introduce four short motions that are relevant to Mr. Stauffer's and Mr. Britt's information. Mr. Hochberg seconded. Mr. Britt spoke against the motion asking that the motions be in writing so the members could consider them. Ms. Sheldon said that there is no requirement that the motion be in writing. Mr. Hochberg clarified that Ms. Sheldon's motions may be procedural and acceptable to Mr. Britt. Mr. Britt suggested that the motions be taken in order as presented to the Commission.

The motion to amend the agenda did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Dr. Stauffer moved to include Substantial Benefit No. 5, Workers Compensation/ Memo No. 9, pg. 1. Ms. Gomes seconded the motion. Specifically it states:

**Substantial Benefit No. 5: Workers Compensation Benefits**

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>46</sup>

The Commission further finds that these benefits are significant and equal 62% of the worker's weekly wage (with a mandated minimum benefit though also with a mandated maximum). This monthly payment to the certified spouse does not end until that spouse's death or remarriage.<sup>47</sup>

Mr. Hochberg moved to amend the title to read "salient and major legal...." Ms. Martin clarified the motion started after the title. Mr. Hochberg withdrew the motion.

Ms. Sheldon moved to table the motion because we the Commission had not reviewed the statute *and no statute was identified*. Mr. Hochberg seconded the motion. He spoke in favor of the motion to table because we have not talked about it or looked at the statute.

Mr. Gill asked Dr. Stauffer when *his lists (referring to the memos) were* submitted. Dr. Stauffer spoke against the motion based on the fact he has made these available to Commission members since October 6.

The motion to table the discussion on Substantial Benefit No. 5 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon asked why we are voting at all, because everyone has made up their minds.

The Chair confirmed that there has been three weeks to review the material. Ms. Sheldon replied that her personal review of the statute is not the Commission's review of the statute. Ms. Kreidman agreed and suggested discussing it now.

Mr. Hochberg asked Dr. Stauffer for a definition of certified spouse. Dr. Stauffer replied *a spouse whose marriage has been recognized* by the State. Mr. Hochberg asked where Dr. Stauffer got the definition. Dr. Stauffer replied the statute. Ms. Martin pointed out that section 386-42, Hawaii Revised Statutes, defines dependents.

Mr. Hochberg moved to strike the second paragraph. Ms. Sheldon seconded the motion. Mr. Hochberg, pointing to the second paragraph spoke in favor of his motion with regard to the major benefit *because we have to decide on* what the economists said. Refreshing the Commission's memory of the economists testimony he stated in order to value a benefit you need to take mathematical steps that have not been taken here because we don't have the necessary data, including how many people would take advantage of the benefit.

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46. Give citation.

47. Give citation.

Ms. Kreidman questioned whether we are examining the benefit's value to the individual or to the community? To the community it may not be a major benefit, but to the individual it may.

Mr. Hochberg said, *in his opinion*, the economists were not speaking to the benefits to society. Except maybe Dr. La Croix. *Mr. Hochberg said the economists were telling us the difference between the individual and the community is the "economic value"*.

The motion to strike the second paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

A call for the question on Substantial Benefit No. 5 was made. The motion to accept Substantial Benefit No. 5 as stated passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 6, wrongful death benefits, as stated in Memorandum No. 8. Ms. Gomes seconded the motion. Specifically it states:

#### **Substantial Benefit No. 6: Wrongful Death Benefits**

The Commission makes the following findings for this section:

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>48</sup> and marital care, as well as the expenses of any illness and burial. In most cases, an uncertified spouse cannot sue for support. If the legal spouse is the only dependent of the deceased, the loss of support can be up to 40% of the deceased' lost earnings.<sup>49</sup>

For example, if someone murders or is otherwise responsible for causing the wrongful death of a spouse, the government may or may not bring criminal charges or other actions against the person causing the wrongful death. But aside from workers compensation (if the death was caused on the job), and except for any private insurance the couple may have carried, and except for the extremely limited payments under the Victims' Compensation Act,<sup>50</sup> the surviving spouse 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

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48. Give meaning of this term.

49. Give citations. (Probably: HRS sections 663-3, 663-18.)

50. Get correct name of act (for the text above), and also give the precise statute citation here.

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.

This nevertheless is a substantial benefit, and possessing it gives a couple (and their children) a certain peace of mind during their lifetime together. While wrongful deaths are rare, worrying about them (and worrying about how the surviving spouse and children will be supported) is a much more common occurrence. These laws provide this comprehensive form of benefit, at no real cost to the government, and the benefit is a significant one.

Dr. Stauffer clarified that this benefit is defined in the wrongful death statute, which is section 663-3, Hawaii Revised Statutes.

Ms. Sheldon stated that just because you have a marriage and a death you don't have the right to bring a wrongful death suit. The statute is limited in what it allows you to claim, it does not allow a windfall benefit.

Dr. Stauffer agreed that *the benefit* is only opened *under certain circumstances* of wrongful death and still speaks in favor of accepting this as a benefit.

Mr. Hochberg moved to table the vote because we don't have the statute, or the exact language. Ms. Sheldon seconded the motion.

Ms. Kreidman reminded Mr. Hochberg that this is a first run and we have an opportunity to adjust. And now we're throwing out the benefits for initial review.

The motion to table the discussion on wrongful death did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Mr. Hochberg addressed the substance of the alleged benefit. He stated that before this Commission could determine whether this was a major legal and economic benefit the economic calculations needed to be addressed because of the change in the tort law that is eminent. He said there are expected changes relating to hedonics, and loss of consortium, although he couldn't say exactly. Mr. Hochberg sees a problem with declaring something that probably will not exist much longer as a major legal and economic benefit. His second point is the validity of statement that reads "40% of the deceased's lost earnings..."

Dr. Stauffer replied it came from the testimony of Dr. La Croix and Dr. Badgett. Mr. Britt added that it is not in the Commission's duty to predict what the Legislature will do regarding benefits that currently exist on the books, or to determine how many people will partake in the benefit only that the fact that it will happen to some one at some time.

Mr. Hochberg says our economists view is that they don't look at that way. And without that economic evaluation he believes we're not doing what the legislature asked us to do.

Ms. Sheldon added that while recognizing these are drafts we are looking at today but what is the point of voting on something that's wrong? We're drafting wrong things, and this particular paragraph (first full paragraph) is wrong.

Mr. Britt disagreed with the statement that they are wrong. That is an interpretation. He reminded Ms. Sheldon that there will be an opportunity to present the objections in a minority report, but we need to proceed. Mr. Britt stated that many of these discussions appear to be to delay and obstruct so that there would be no report.

Ms. Sheldon clarified that she did not say everything is wrong. She just refers to the first full paragraph. Mr. Britt agreed that if Ms. Sheldon disagrees with anything then it is her obligation to state that.

Mr. Hochberg said that there are things that are currently tied to marital status that should be removed from their dependency on marital status. Assuming wrongful death meets the definition of major legal and economic benefit the elimination of marital status requirement from wrongful death rights would make it marriage neutral.

The motion to accept Substantial Benefit No. 6 -- wrongful death benefits passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

The Commission recessed at 10:50 a.m. and reconvened at 11:00.

Mr. Hochberg asked Ms. Martin to have a copy of the tapes or written refusal from her Director. Ms. Martin said she would ask the Director.

Dr. Stauffer moved to accept Substantial Benefit No. 7, Hawaiian Home Lands surviving spouse benefit. Mr. Britt seconded the motion. Specifically it states.

**Substantial Benefit No. 7: Hawaiian Home Lands Surviving Spouse Benefit**

The Commission finds that 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>51</sup> while a spouse without a marriage certificate cannot.<sup>52</sup>

The Commission further finds that the "marriage benefit" here depends on having the lessee spouse die while the legal spouse is still living. The value of the

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51. An inheriting legal spouse need be only 25% blood-quantum.

52. Give citation.



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

Dr. Stauffer spoke in favor of the motion explaining the law provides that only a *legal* spouse can take over the lease.

Mr. Hochberg moved to table the motion until we could approve the minutes. Ms. Sheldon seconded the motion.

The motion to table the discussion on Substantial Benefit No. 7 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

The question whether two people can be on the lease was asked. Dr. Stauffer *referred to the law, which states* if you are not *Hawaiian* you can't be on the lease. The only time two spouses can be on the lease is if both are *Hawaiian* and qualify. Ms. Sheldon asked Dr. Stauffer to footnote the \$4812 figure. Dr. Stauffer agreed and added that the information is from testimony of Dr. La Croix and Dr. Lee Badgett. *The testimony from Dr. Ghali could not be considered an option.*

Mr. Hochberg spoke in favor of Dr. Ghali's analysis. Dr. Ghali *did* not advocate throwing the surviving spouse out on the street. He said you have to figure out what's going to happen to the *Hawaiian* family that loses the lease, and who's going to pay and what the cost is for that family is to live somewhere else.

The motion to accept Substantial Benefit No. 7, *Hawaiian Home Lands* surviving spouse benefit passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Hochberg moved to add Dr. Ghali's analysis in Substantial Benefit No. 7. There was no second to the motion. The Chair reminded Mr. Hochberg that he could submit that information in the minority report or at a meeting where additions and deletions will be reviewed.

Dr. Stauffer moved to accept Substantial Benefit No. 8, "Savings in Creating the Relationship". Mr. Britt seconded the motion. Specifically it states:

**Substantial Benefit No. 8: Savings in Creating the Relationship<sup>53</sup>**

The Commission makes the findings below, covering this section:

Besides the intangible benefit of equality; besides the central core benefits that come from the internal commitments of a certified family; and besides the benefits

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53. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage; Revised Testimony Before the Commission on Sexual Orientation and the Law, State of Hawaii, September 27, 1995, revised October 5, 1995. Mss, 9 pages.

cited above in insurance, retirement, and death benefits; there is another commonly understood package of benefits that are associated with being certifiably married.

This package can be called "creating the relationship." The benefits in this package start with the right to change your name without paying the normal costs of a name-change.<sup>54</sup> The package continues in automatically-created legal relationships with your spouse and your children.

Some of these benefits are repeated under other categories,<sup>55</sup> but they can also be lumped together here because many of them can be partially "replicated" without having a government certificate. For example, to change names, the spouse(s) can use the normal (payment) route provided by law.

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. Third, the "replication" is not always guaranteed.

As just one example amongst many, under normal law, a certified spouse generally has the right to "inherit" the sole custody of any dependent children at the time of death of the other spouse.<sup>56</sup> Non-certified spouses can attempt to "replicate" this right by each having careful wills and trusts set up by their lawyer(s) at substantial cost.

But these legal documents are not necessarily binding. Other family members can -- and have -- challenged the wills and trusts and have sometimes succeeded in taking the children, despite the clear wishes of the deceased.

We can therefore place a known financial value on this specific marriage-certificate benefit through finding out what it would cost to "replicate" the benefits by drawing up documents.<sup>57</sup> But there must always be an additional, unknown value in this example, namely the degree of worry to the spouses (and to the children) that their family will be torn apart at the time of death of one of the spouses. Similar findings exist for several of the other benefits in this package.

Having made these points, it remains that the government certificate is a single relatively simple and inexpensive step to create this package of relationships without having to go through the bother of lawyers. Hawaii law provide for at least the following benefits covered by this package:

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54. Give citation; also cite earlier discussion in the report.
  55. For example, the claiming of a deceased' body is included as an intangible benefit, above, while the benefits of probate and certain divorce rights are also referred to under the first substantial-quantitative benefit above.
  56. Give citation.
  57. 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 couples' estates and other factors.

- \* Access to Family Court for the award of child custody and support-payment proceedings.<sup>58</sup>
- \* The right to enter into premarital agreements.<sup>59</sup>
- \* The probate code which provides protection rights, notice rights, and other inheritance rights to the spouse and other related parties.<sup>60</sup>
- \* Defined principles for the control, division, acquisition, and disposition of community property in divorce.<sup>61</sup>
- \* The right to spousal support and the right to file a nonsupport action.<sup>62</sup>
- \* The award of child custody and child-support payments in divorce proceedings.<sup>63</sup>
- \* Post-divorce rights relating to support and property division.<sup>64</sup>
- \* Full parenting rights to children born or adopted within the marriage.<sup>65</sup>
- \* The right to claim a deceased spouse's body.<sup>66</sup>
- \* The right to name change.<sup>67</sup>

The estimates below of the value of these "replicated" rights are undervalued, not only because the rights being replicated are incomplete, but also because the documents often have to be drawn up more than once, as they will often have to be changed as conditions in the marriage change.

The government certificate therefore allows a married couple to save both the money and the time associated with drawing up these documents and then having to

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- 58. Give citation.
  - 59. Give citation.
  - 60. Give citation.
  - 61. Give citation.
  - 62. Give citation.
  - 63. Give citation.
  - 64. Give citation.
  - 65. Give citation.
  - 66. Give citation.
  - 67. Give citation.

worry if they will stand up in court. These benefits are significant, amounting to several thousand dollars.

- a. Change of name: \$300 each. If both persons wanted to change their names (e.g., hyphenate them): \$600 total.
- b. Parenting agreement, including what happens if the marriage is dissolved; this agreement includes the care for children and about custody and visitation rights if the marriage is dissolved: \$500.
- c. 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.
- d. Living will, if not additionally billed as part of drawing up a will; these allow each spouse to give instructions about medicare care, including instructions on terminating life-support systems: \$75 each, or \$150 total.
- e. Will, not including billing for a living will, described above, but including instructions about burial and body disposition: \$150 each, or \$300 total.
- f. 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.
- g. Contract for buying or owning homes together: \$500.
- h. Trusts for each partner, facilitating successorship rights; since in Hawaii only the single biological or adoptive parent is has legal custody of the children in a non-certified family,<sup>68</sup> additional security for the children is possibly by each spouse preparing a trust; both spouses put all of their assets into their individual trusts and name themselves as sole trustee; the other spouse is, in each case, then named as the designated replacement trustee in the event of their incapacitation or death, and provisions are made for any children: \$1,500 each, or \$3,000 total.
- i. Second-parent adoption; the couple could attempt to convince the State Legislature to legalize second-parent adoption; such a law would allow the biological or adoptive parent to agree to have a second adoptive parent for the children without the first parent giving up parental rights; passage of such a law would remove the need for a parenting agreement (#b above) and possibly for the trusts (#h above). The cost of convincing the Legislature is difficult to assess but is, in any event, substantial.
- j. The cost of the uncertainty of not having legal rights but only "replicated" rights.

Basic value of a government certificate, assuming second-parent adoption has not yet been approved: \$7,750 with each spouse taking a new (e.g., hyphenated) name, or \$7,450 with one spouse changing their name. These basic figures should be increased by the "cost of uncertainty."

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68. Give citation.

An additional point concerning wealth should be made. Many marriage-certificate benefits are available only to couples that are wealthy enough, for example, to fly around the world and attempt to make use of their marriage status in foreign countries.

By speaking of lawyers in this section, a reader could conclude that such benefits only apply to a couple with the money to hire the attorneys needed to draw up the documents.

But the point here is just the opposite: all these rights are available to the poorest couple, for the small \$25 fee of getting a marriage certificate. The \$7,450 or \$7,750 cost of the attorneys is therefore only a way of estimating the economic value of this group of benefits that are free to a certified couple.

It is also important to stress that all the above prices are given with the understanding that the rights and benefits being created here by these legal papers are not created by law but only by the contracts or other legal instruments being created by the lawyers. In other words, the poor but certified couple actually have stronger rights (with added value) to those gained at great expense by the non-certified couples paying for the "replicated" rights.

That is because the rights and benefits are not being conferred by statute, and the affected couple --no matter how many lawyers are hired at whatever price -- has weaker protection than the poorest, most vulnerable couple that is protected by a legal marriage certificate. The couple without the marriage certificate is more exposed to liability, challenge and litigation, not to mention an added exposure to stress and a lack of peace of mind.

Furthermore, the additional exposure to liability, challenge, and litigation becomes an additional economic matter as there would be further costs in defending against any challenge to these contracts and legal documents. And even with these defense-attorney costs, there are no guarantees that the defense, at whatever cost, would be successful.

In theory an insurance company could estimate the risks of legal challenge, the costs of defense, and provision for a financial payment if the defense lost. The cost of that insurance policy -- which would be extremely expensive, could be computed and added to the number above.

Dr. Stauffer spoke in favor of the motion and reviewed some of the highlights of the material. He pointed out there are two values for the change of name which takes into consideration if *one or both* parties wanted to change names. He explained with regard to the parenting agreement, that without a marriage certificate you need to draw up a parenting agreement *with* an attorney which costs approximately \$500. This is also the case with a durable power of attorney in the event one has to make decisions for an incapacitated spouse. The fee for this is \$100.

It was pointed out that these may replicate the powers of a marriage certificate, but even if these items are drawn up they are not as strong as the spousal assumption under the law.

The cost figures are from Dr. Stauffer's research, of three local attorneys who handle this type of law.

Mr. Hochberg moved to table motion because it is a complicated issue that we haven't dealt with at any of our meetings. Ms. Sheldon seconded the motion.

The motion to table the discussion on Substantial Benefit No. 8 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon addressed the costs attached to some of these issues. Specifically, item a, and stated that usually only one party changes their name when they get married. To say the benefit is \$600 is not real figure.

Dr. Stauffer replied that sometimes people hyphenate so he has considered the fees if both or only one change their name in the tally of the costs.

Ms. Sheldon then addressed the parenting agreement. She wanted clarification because it is her understanding that in same-sex relationships, generally kids come from a previous heterosexual relationship. Normally, one will be the biological parent. If the biological parent dies then the parenting agreement is to allow the children to stay with the non-biological parent, *where usually the children will go to the other biological parent or family.*

Ms. Kreidman added that those of us who are granted certain privileges tend not to notice, and she thinks it is important to notice and recognize the privileges we take for granted.

Ms. Sheldon said that she is only interested in what happens to the children. What about the other biological parent.

Ms. Kreidman responded with the scenario that what if there is no other biological parent. If the children, who have lived in the household for their 12 years and have developed relationships based on family status and the biological parent dies, what about the relationship between the former lover's parents and the children's relationships with all those people?

Mr. Hochberg reminded the Commission that Dr. Kehoe's testimony addressed concerns about children raised in homosexual households. He said the courts never allow the homosexual parents to have custody of the child and *it* would be decided the same as regular marriage couples, whatever is best for the kids.

Dr. Stauffer stated that it is his belief that where there is a disagreement over the custody of the children, the wishes of the custodian are relevant to be known. If the grandparents fight over kids then the custodian's input is valuable. If *they* were married it would be automatic .

Mr. Hochberg disagreed. He believes *in custody issues it's always what is best for the child.*

Dr. Stauffer agreed there are scenarios where the the court does not take into consideration the desires of the parents.

Ms. Sheldon believes the only time they would need a parenting agreement is if there were same-sex couples, *and the parenting agreement would be irrelevant because the child would normally go to the biological parent. If it should be determined that the best interest of the child would be to remain with the non-biological parent, that would happen without a parenting agreement.*

Dr. Stauffer stated that he is thinking of other situations. Ms. Sheldon replied that it would be impossible to consider every example. Dr. Stauffer agreed that we don't want to pick up every manini example in the world. The list of costs for replicating the relationship comes from Lee Badgett who got *it, in part*, from a lawyer's book. Dr. Stauffer attached figures *based on what* a Honolulu attorney would charge.

The Chair pointed out that all benefits do not apply to everyone.

Ms. Sheldon, then pointed out if you don't draw up a living will, its the same treatment as for married people. Dr. Stauffer agreed with Ms. Sheldon and withdrew paragraph "d".

Ms. Sheldon moved to strike paragraph "e" because when you draw up a will any couple can draw up those situations. Mr. Hochberg seconded.

Dr. Stauffer spoke against the motion.

Mr. Hochberg spoke about two people dying simultaneously. This should be one of the marital status dependent issues that is removed.

The motion to strike paragraph "e" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon addressed paragraph "g". She stated that one doesn't have to be married to purchase a house together and there is no benefit to married couples described in paragraph "g" that is different for same-sex couples.

Dr. Stauffer agreed that two strangers can buy a house, but this benefit addresses the ideas of how the home is to be managed. Mr. Hochberg stated in his personal experience and owning a house with his wife, there has never been a discussion as to how to run the home.

Dr. Stauffer voluntarily withdrew paragraph "g".

Ms. Sheldon moved to strike paragraph "h" because it is unnecessarily characterized as a benefit because opposite sex-couples have to take the same action for trusts as same-sex couples do. Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion to strike because, while it *is true that* anyone can draw up a trust, if a trust isn't drawn up, only a *legally* married couple would have the rights enumerated in paragraph "h".

Mr. Hochberg said that the second argument regarding spouses drawing up a trust should not be tied to children's custody which is not reliant on marital status.

Ms. Kreidman wondered how paragraph "h" differs from paragraph "c". Dr. Stauffer says it relates to money, and financial matters.

Dr. Stauffer spoke to child custody issues by stating that parents would like to have the partner be the trustee to support the children, although he recognized that there may be other ways to address this.

Mr. Hochberg stated that at a bank you only need to have the account in both names. Ms. Sheldon stated that in her experience, this is not exclusive to married couples.

Dr. Stauffer also *said* that in paragraph "h" he had personal *knowledge that* there are things that could happen and this is the way to protect yourself out of *legal* wedlock.

Mr. Hochberg confirmed that even though Dr. Stauffer did not know specifically why it should stay in you would like to see it stay in. Dr. Stauffer agreed.

The motion to strike paragraph "h" did not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, and Dr. Stauffer, voting nay. Ms. Kreidman abstained.

Everyone agreed to recess and reconvene 9:00 a.m., November 2, 1995 in the same room.

Ms. Sheldon submitted motions to staff to distribute to Commission members for the next meeting.

The members briefly discussed future meeting dates and times.

The minority members agreed to meet on Thursday, November 9, 1:00 p.m. in State Capitol Room 325 or State Office Tower, Room 1008.

Regular meeting scheduled for November 8, 1995, Wednesday, 9:00 a.m., Room 329, possibly continuing to November 9, 9:00 a.m.

The meeting recessed at 11:45 a.m.



Mr. Hochberg requested a press release for recessed meetings and requested a carbon copy.

**November 2, 1995**

The Chair reconvened the meeting on November 2, 1995, 9:13 a.m. in Room 1008, State Office Tower. He confirmed the continuation of the October 25, 1995, meeting agenda to first continue with Dr. Stauffer's motions, then Mr. Britt's motions.

The schedule of meeting dates was reconfirmed. The meetings were set as follows:

Monday, November 6, 1:30 p.m., Room 1008, State Office Tower; Wednesday, November 8, 9:00 a.m. to noon, State Capitol, Room 329, to be continued on November 9, State Capitol, Room 329, 9:00 a.m. to noon. The alternate site for the meetings on the 8th and 9th would be Room 1008, State Office Tower. The Minority Subcommittee meeting was set for Thursday, November 9, 1995, 1:00 p.m., to be continued on Tuesday, November 14, 1995 at 5:00 p.m.

Mr. Hochberg asked the LRB to set up a press release for continued meetings. Ms. Martin said she would do that.

Ms. Sheldon moved to that the Commission allow members of the public who appear at the Commission's day-to-day, unnoticed meetings be allowed to testify if they so desire. Mr. Hochberg seconded the motion.

The Chair expressed how the work of the Commission would be delayed if the public were allowed to speak at every meeting. He expressed the need for an opportunity to complete the agenda. *He reiterated how each agenda allowed for public testimony.*

The motion failed with Mr. Hochberg and Ms. Sheldon voting aye; Ms. Britt, Ms. Gomes, and Ms. Kreidman, voting nay; Dr. Stauffer abstained.

Ms. Sheldon wanted clarification that the Commission voted against allowing the public to speak. Ms. Kreidman clarified that the public has an opportunity to testify as stated on the agenda. Ms. Gomes further explained the continuances should be looked at as a continuum and the public has had a chance to speak on this agenda.

The Commission then continued discussion on Dr. Stauffer's memorandum.

Ms. Sheldon moved again to strike paragraph "h". Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion by restating that the process that unmarried same-sex couples have to go through, is not a *necessity*, but sometimes *things happen which make it necessary*. Some of the benefits of marriage are automatic but can be *partially*

replicated in a trust. His personal experience was that the trusts set up *some of* what the marriage certificate grants automatically.

Mr. Hochberg said that Justice Levinson in the Baehr case said that the state has guarded the definition of family for 75 years and we should not change this.

Mr. Britt asked how do you justify that if there is an adoption in a same-sex relationship where neither parent is the biological parent of the child. Who gets the child if the person who officially adopts the child dies?

Ms. Sheldon stated that the child goes to the family of the adopted person. Mr. Britt replied that often the "family" does not include the unrecognized spouse in a same-sex relationship.

The motion to strike paragraph "h" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and the Chair voting nay. Ms. Kreidman abstained.

Ms. Sheldon moved to strike paragraph "i" because it creates a law that creates a benefit.

Dr. Stauffer explained that unless you have a marriage certificate only one person can adopt a child, and therefore, you are not allowed to have joint custody of the child. Hence, if the official adopted-parent dies the other parent does not have any authority. This would necessarily not require paragraph "b" or "h". This would be a substitute. Dr. Stauffer agreed that Ms. Sheldon was correct in terms of the need to lobby, and perhaps items listed in paragraph "i" *should be transferred* to paragraph "b" or "h".

The Chair suggested that perhaps what you are proposing is an alternative. Amending the marriage law, or amend the adoption law to allow this to happen.

Dr. Stauffer withdrew paragraph "i" pending further analysis and can take it up under recommendations.

The Chair suggested that when the Commission comes up with recommendations that there are some alternatives that should be considered.

Ms. Sheldon moved to strike paragraph "j" because everybody has legal rights but there is no right to not have to deal with the stress of legal uncertainty.

Dr. Stauffer responded by explaining if he had a relationship where his partner was a man and becomes incapacitated, and regardless of any parenting agreement, then the family of his partner could intrude and take the child because the presumption is to the biological family of the adopted parent.

Ms. Sheldon said the court always looks at the best interests of the child, which is not a benefit of a marriage. Dr. Stauffer agrees there is no absolute right, but if there is a marriage certificate there is a better chance of obtaining custody. Mr. Hochberg says the decisions are based on the best interests of the child. The courts will look at who has been taking care of the child for the longest period of time. Mr. Britt believes that there is a certain set of assumptions when there is a certificate and believes there is a legal certainty to that relationship. Dr. Stauffer agreed that there is weight given to marriage.

Mr. Hochberg proposed that if the Legislature gets a recommendation that if you have a marriage certificate you should get rights to a child that would be an erroneous benefit.

The motion to strike paragraph "i" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon asked what "an additional point" is about? *Referring to the second paragraph after paragraph "j" in the motion for Substantial Benefit No. 8).*

Dr. Stauffer explained that it is part of the narrative for the argument of the benefit. It is based on the fact that the Commission adopted *the fact that* there may be benefits in an international arena, which could be obtained only if you have the money to travel to those jurisdictions. Ms. Sheldon asked how does it fit in? Dr. Stauffer responded that it fits in with regard to the fact that some benefits are connected to wealth. *Roughly* the same benefits would be available to a couple who has to pay only \$25 for a marriage license, as to a same-sex couple for the *much larger* amount that it costs to pay a lawyer. Mr. Hochberg believed it should not be included in today's report if it's policy. The Chair clarified that it's an argument. Dr. Stauffer confirmed that yes, it's an argument, not a policy.

Ms. Sheldon asked about the paragraph that starts "*That is because the rights...*" and ends "*..not to mention an added exposure to stress and a lack of peace of mind.*" She reaffirmed that stress knows no gender; being exposed to litigation is a part of life.

Ms. Sheldon moved to strike that paragraph. Mr. Hochberg seconded the motion. Ms. Sheldon spoke in favor of the motion stating that a married couple could have more liability than the same-sex couple. Mr. Hochberg agreed. Dr. Stauffer agreed that under the marriage law *that in some cases* the liability of the married couple may be greater *than for an unmarried couple. Still, on balance, the benefits and rights are greater for the married couple..*

Mr. Hochberg stated that this is the major problem with the adoption of the terminology; *he felt* it does not include burdens. Here we are not going to acknowledge there is a larger burden on married couples in the area of the stress and liability. This points out why the terminology is wrong.

Dr. Stauffer agrees that this a good point. He pointed out that the Commission has already approved many commitments that couples make to each other in Substantial Benefit No. 1. The economists believe those to be burdens, so in essence the Commission has

approved some burdens. We are just dealing with *the issue* at different times. Mr. Hochberg disagreed. He stated that he believes it is not a major benefit when you consider the burden.

Ms. Sheldon called for the question.

The motion to strike the paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon moved to strike the paragraph on pg. 7 starting "In theory..." Ms. Gomes seconded the motion. Ms. Sheldon said same-sex couples don't pay any more insurance than married couples. Mr. Hochberg clarified except if it's life insurance based on health issues.

Dr. Stauffer spoke in opposition of the motion to strike. He stated that it is based on paragraph "j" that says you can't replicate the relationship totally. Dr. Stauffer's research said that anyone can insure anything at a cost, so this paragraph is an attempt to quantify it. Mr. Hochberg stated that legal right replication insurance, would never be written. Someone should ask Lloyds, and if they will not insure it, we know its *not* a major benefit.

The motion to strike the paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, and Dr. Stauffer voting nay. Ms. Kreidman abstained.

Ms. Sheldon moved to obtain Dr. Badgett's credentials and information to the Commission to determine if the Commission should accept the information in Dr. Badgett's testimony. Mr. Hochberg seconded the motion. He believes that Dr. Badgett should be held to the same scrutiny that any testifier is held to.

The Commission recessed at 10:25 and reconvened at 10:30.

Dr. Stauffer spoke against the motion. He stated that the information is on the record and is available for Commissioner's review already, and there is no reason to have to qualify testifiers to this Commission. Mr. Hochberg disagreed.

The motion to request credentials of Dr. Badgett did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg clarified that the footnote *in the title of the motion* is not part of the motion. Dr. Stauffer *disagreed saying* that he wanted to include the note as a *citation*. He *agreed with Mr. Hochberg that part of the title was dropped, so he would move the footnote to the end of the current title* of Substantial Benefit No. 8.

Mr. Hochberg moved to amend footnote 1 to include "See also the written testimony of Dr. Ghali..." Ms. Sheldon seconded, she stated it would provide a balance to this portion of the report. The Chair agreed. Dr. Stauffer, *as movant* agreed also, so *there was* no need for the motion. Mr. Hochberg withdrew the motion.

Mr. Hochberg asked what is meant by benefits of internal commitments? Dr. Stauffer replied that it is based on Substantial Benefit No. 1: having a marriage certificate operates as internal commitments. Previously, and here, it is used as a summary of points made *on this topic*.

Mr. Hochberg expressed that he feels that there was not the level of opportunity to investigate and wants to go back to the previous mention of this and Substantial Benefit No. 1 to discuss it. Dr. Stauffer reminded Mr. Hochberg that the Commission agreed not to back track. The Chair confirmed that Mr. Hochberg would have an opportunity to oppose it at a later meeting.

Mr. Hochberg clarified that it is the right of the government to come in and manipulate the relationship? Dr. Stauffer stated that he believed the words are clear and he was not sure where the *communication* breakdown was *coming from*. Mr. Hochberg stated that Substantial Benefit No. 1 comes into play when there is lack of internal commitment. Ms. Kreidman added that even when married spouses make commitments the government bolsters the commitment.

Mr. Hochberg said one only needs the central core benefits come from the internal commitments but they only arise when there are no internal commitments. Dr. Stauffer replied *by referring to* the discussion about the internal commitments *of a certified marriage* that the Commission has already approved. *Of course, he said, someone could always argue the benefits come from somewhere other than the law*. Mr. Hochberg continued and accused Dr. Stauffer of changing from the original Substantial Benefit No. 1 from being the internal commitment, to now say the benefit is the government enforcement that the commitment is kept. Dr. Stauffer *replied that he* believed the dispute revolves around language. Mr. Hochberg *replied that he* believes it is meaningless. He believes Substantial Benefit No. 1 is not stated in the paragraph. Dr. Stauffer disagreed *saying that if there are two ways to say things that mean the same thing, then it's a matter of language, and a layperson understands that*.

The Chair asked if there was a motion on this issue. Mr. Hochberg moved that *the section at the beginning of Substantial Benefit No. 8 which begins "besides the central core benefits.." be changed to read "besides the core benefits that come from the power of to enforce failed internal commitments..."* Ms. Sheldon seconded.

Dr. Stauffer spoke against the motion stating that it is inappropriate at this time and the words being asked to adopt are not accurate. Mr. Hochberg thought the Commission should adopt language that it likes.

Ms. Sheldon spoke in favor of the motion for consistency, to the extent it is inconsistent.

The motion to add the stated language did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg addressed the line that reads, "Some of these benefits..." One of these *benefits* is *the free* name change, and he would like a list of the other benefits. Dr. Stauffer agreed a list needs to be made and will add the requisite citations. Mr. Hochberg *restated* his position with regard to the next paragraph. Dr. Stauffer agreed.

Mr. Hochberg expressed his concern about the word "many" representing less than "many". In addition he wonders what is the "known financial value"? Dr. Stauffer agreed to add "estimated" in front of "known financial value". Mr. Hochberg stated that footnote no. 5 (*no. 57 in these minutes*) needs to name the local attorneys. Dr. Stauffer agreed to get the names.

Mr. Hochberg addressed the issue of premarital agreements. What is the right of enforcement to enter into a premarital agreements? He expressed that it is his understanding that they are not given weight in court. Dr. Stauffer replied that the state Supreme court cited this particular benefit referring specifically to the statute on premarital agreements. Mr. Hochberg reiterated his disagreement.

Mr. Hochberg asked if the known undervalued estimate is stated? Dr. Stauffer said yes, because these benefits are individual and things change so there necessarily has to be a range. Mr. Hochberg wondered if this differs for married couples? Dr. Stauffer reminded Mr. Hochberg that the Commission is talking about replicating the benefits of marriage. Ms. Kreidman tried to explain by giving this example. If she is married, and I have another child I don't need to do anything because I have marriage certificate, a same-sex couple would have to take further action to ensure the same protections for that child. Mr. Hochberg stated that married people who draw up trusts and then things change, still have to pay to the costs involved in changing. The time and cost of what you want to rely on is an expected value if the benefit is major. We need to consider the testimony of the expected value of both economists.

Dr. Stauffer disagreed *with Mr. Hochberg's statement "both economists"* and stated that Mr. Hochberg is entitled to his opinion, but Dr. Stauffer believes that the economists disagreed *in their testimony* and *he* believes Mr. Hochberg is putting words in the mouth of Dr. La Croix because Dr. Ghali was speaking about the value to the community and Dr. La Croix was referring to the individual. Mr. Hochberg reiterated the problem with not approving the minutes. Ms. Sheldon questioned how Mr. Hochberg was putting words in the mouths of the economists.

Dr. Stauffer recalled that it was under public policy where the economists' testimonies were similar. Ms. Sheldon asked if *the policy relating to domestic partnership* included opposite-sex couples. Dr. Stauffer *noted* that the Commission has not *yet decided the issue as it relates to "public policies," which will be taken up later*. Mr. Hochberg stated that is incorrect. You have to know the market you are in because it is not honest to tell the legislature otherwise. Dr. Stauffer took offense at the accusation that the Commission is not being honest. *He pointed out the Commission is still investigating benefits to an individual, which is Part I of its task and public policies is Part II.*

Ms. Kreidman made a comment regarding her discussions with legislators and agreed to ask if she could identify those legislators.

The Chair asked how much more discussion could be expected in order to judge for time. Mr. Hochberg responded by saying "enough time."

Mr. Hochberg continued to address the Substantial Benefit No. 8 by focussing on the word "many". Dr. Stauffer reminded Mr. Hochberg that the Commission already discussed that and a motion to strike failed. The Chair also reminded Mr. Hochberg that he is returning to issues that have been decided and therefore the Chair ruled Mr. Hochberg out of order.

Mr. Hochberg moved that the chair is not well taken. Ms. Sheldon seconded the motion.

The motion that the chair is not well taken did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg brought up the Life Foundation, which *he said* is the homosexual community center where you can get free wills, etc., so there is not a need to *include* any of these kinds of *legal* benefits because they already exist *for free*. Mr. Britt clarified that *the Life Foundation is not a gay/lesbian center but exists to help those who are HIV-positive. Further, the services of the Life Foundation are limited to those persons who have depleted their resources.* Mr. Hochberg believes *the Foundation* needs to be included simply *because it is a resource.* Mr. Hochberg asked if the Commission has a problem adding the Life Foundation to footnote 5. Dr. Stauffer replied yes, because then we would have to include legal aid, your brother, *and anyone else who could help, etc.*

Mr. Hochberg moved to add to footnote 5, in addition to other examples, where qualified people can obtain these legal services free of charge from the Life Foundation. Ms. Sheldon seconded the motion.

The motion to add material to footnote 5 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Gomes took offense at Mr. Hochberg's statement regarding the Life Foundation. She stated that an intelligent person like *Mr. Hochberg, who had once* volunteered to provide services at the Life Foundation, has to know that those services are not available to the entire community.

The vote to accept Substantial Benefit No. 8 passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye, and Mr. Hochberg and Ms. Sheldon voting nay.

Ms. Sheldon requested the Commission to consider her motions, that were *then* passed out. Dr. Stauffer agreed *and suggested* that the Commission could make an exception and allow his motions to be interrupted to hear Ms. Sheldon's four motions

Ms. Sheldon moved that Chairperson Gill address the inquiries contained in Commissioner Sheldon's October 17, 1995 letter to Mr. Gill which was faxed to all Commissioners before we proceed with any further consideration of proposed sections of this Commission's report because responses to those inquiries are crucial to this Commission's consideration of any alleged findings contained in either Dr. Stauffer's or Mr. Britt's proposed report sections.

The Chair responded that he would address the issues at the end of the agenda. Ms. Sheldon withdrew the motion, pending opportunity to respond. Ms. Sheldon also stated that she takes serious exception to the Chair's implication that she his delaying the action. She reminded *the* Chair that she was appointed to do a job and she's going to do it.

The Chair agreed that he was also appointed to a job and he was going to do it.

Ms. Sheldon moved that in light of the fact that the Contents of the Minutes of October 11, 1995 Meeting are directly relevant to and cited in the Memoranda concerning various "salient" and/or legal and economic benefits which Commissioner Stauffer is in the process of presenting to the Commission in the form of motions to adopt said Memoranda as draft portions of the Commission's report to the Legislature, the Commission address the proposed amendments to the October 11, 1995 Minutes and vote concerning the approval of those minutes prior to proceeding with consideration of Commissioner Stauffer's motions regarding the contents of this Commission's report. Mr. Hochberg s seconded the motion.

The Chair reminded Ms. Sheldon that this motion has already been made to put the approval of the minutes at the end of the agenda. Ms. Sheldon interpreted the Chair's comment as asking us to approve items that are dependent on the approval minutes.

The motion to approve the minutes of October 11, before proceeding did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon moved that in keeping with the spirit and intent of Hawaii's Sunshine Law, Hawaii Revised Statutes Chapter 92, this Commission schedule meetings on the neighbor islands in order to provide all of Hawaii's citizens an opportunity to attend and address the Commission with their concerns regarding their questions of whether Hawaii should recognize and legitimize same sex marriage and/or domestic partnership. Mr. Hochberg seconded the motion.

Dr. Stauffer agreed *that going to* the neighbor islands would be good, but if LRB denies funds for that, the Commission could include a statement saying the effort was made. Ms. Sheldon felt it could be a basis to nullify the report. Mr. Britt suggested using a studio and broadcast with interactive television. Ms. Martin cautioned that the Sunshine Law requires official rules for video conferencing. Adopting those type of rules is not effective for a short-term commission.



*After clarifying the issue with Ms. Sheldon, Dr. Stauffer withdrew his support of the motion on the basis of Ms. Sheldon's position that if the motion passed and funding was unavailable, it would be used to nullify the report.*

The motion to schedule meetings on the neighbor islands did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Dr. Stauffer asked the chair to make a formal request to the Director of LRB for funds to go to the Neighbor Islands. The Chair agreed.

Ms. Sheldon moved that this Commission adopt Robert's Rules of Order for the conduct of this and all remaining meetings of the Commission in order to establish and promote balance and consistency in the handling of matters before this Commission. Mr. Hochberg seconded the motion.

The Chair noted this motion had been made previously. Ms. Sheldon spoke in favor of the motion as brought up in her letter to Mr. Gill. The reason for Robert's Rules of Order was to be sure that Mr. Gill *did not change the rules as the Commission goes along.*

The motion to adopt Robert's Rules of Order did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, and Ms. Kreidman voting nay. Dr. Stauffer abstained.

Dr. Stauffer moved to accept Substantial Benefit No. 9 as amended above. Mr. Britt seconded the motion. *Specifically, the motion reads:*

**Substantial Benefit No. 9: Income-Tax Benefits From Tax Tables**

The Commission makes the following findings, for the information contained in this section:

The impact on income tax payments is complex, partly because both State and Federal tax laws are involved, but also because the effect of having a government certificate depends on such factors as the number of earners in the family and the level of each spouse's earnings.

This section presents two general scenarios: one in which legal marriage reduces a couple's income taxes and a second in which legal marriage increases a couple's income taxes.

These two scenarios are based on the well-known "Arnie Aloha family," described in the latest (1994) edition of the Tax Foundation of Hawaii's brochure describing the taxes of such a family. One spouse earns \$38,357 and the other earns \$29,232, and they have two young children. After adding in other sources of income, their total family gross income is \$84,760.

After subtracting their itemized deductions of \$15,476, the couple's taxable income is \$59,484 and their tax bill is \$16,943. If they had no children, their

taxable income would have been \$64,384, and they would have paid \$18,523 in taxes.

Now, let's suppose the same couple did not have a government certificate. They therefore have no choice of filing joint income-tax returns, and so let us suppose (for simplicity) that their family "other income" is split between the two spouses and that their family deductions are likewise split. Let us also assume that the higher-earning spouse takes the two children as dependents and files as "head of household." In this case, their income taxes would be \$14,730, a savings of \$2,213! This shows the "marriage penalty" -- the same couple pays \$2,213 more by getting legally married.

The "marriage penalty" is even seen if they had no kids: they would pay \$806 more by getting legally married. In both examples of having kids or not, the problem is that both had sizeable earnings from working.

Now, let's look at a second scenario. All the numbers are the same, except now all the wages are made by just one of the spouses. With the two kids, their tax bill would be \$16,943. Without kids it would be \$18,523.

In this case, the married couple without a government certificate get penalized: their taxes (with kids) would be \$1,226 more, and without kids the taxes would be \$2,897 more! This shows the "marriage bonus" for having a government certificate: \$1,226 or \$2,897.

All these numbers are reproduced in Table 1.

These examples reproduce the familiar result that the current income-tax tables favor families with one primary wage-earning, and penalize families with two earners; these findings are available in the economics literature.

Testimony was also received by the Commission that the average of the tax effects on all legally married couples in the U.S. is a "marriage penalty" of \$4,500.<sup>69</sup> That is to say, some couples with certificates will get a bonus, while others will not only not get a bonus but will get a penalty, and the average of all couples is estimated to be a penalty.

On the other hand, for some families, having the marriage certificate can produce a substantial benefit. Where the income of the spouses is unequal, or where one spouse stays home with the children (or is in school or a full-time training program, or already retired), we would expect to see a "marriage bonus" in their income taxes. Hence substantial benefit for at least some couples exists.

Still, the fact is compelling that the over-all effect of the income-tax system is a penalty for couples wishing to get a marriage certificate.

Testimony was received, however, that perhaps sheds the greatest light on this matter.<sup>70</sup> The fact is that a couple deciding whether to apply for a marriage license or not, generally have a CHOICE concerning what they wish to do.

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69. Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

70. Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

Two individuals with jobs might decide, for example, to get their marriage certificate and then have one of them stay home (or only work part-time), thereby qualifying them for the substantial "marriage bonus."<sup>71</sup>

A couple denied the right to get a marriage certificate loses this "choice-benefit," which is a substantial value to lose.

**Table: Federal and State Income Tax Payments for Married and Unmarried Couples**

	Married, Filing Jointly	Unmarried	Gain or Loss w/ Marriage
<b>Dual Earner, w/ children</b>			
Federal	\$11,713	9,724 <sup>a</sup>	1,989
Hawaii	5,230	5,006	224
Total	16,943	14,730	2,213
<b>Dual Earner, w/o children</b>			
Federal	13,085	12,104	981
Hawaii	5,438	5,613	-175
Total	18,523	17,717	806
<b>Single Earner, w/ children</b>			
Federal	11,713	12,688 <sup>b</sup>	-975
Hawaii	5,230	5,481	-251
Total	16,943	18,169	-1,226
<b>Single Earner, w/o children</b>			
Federal	13,085	15,346	-2,261
Hawaii	5,438	6,074	-636
Total	18,523	21,420	-2,897

Notes: a: Higher earner files as head of household; lower earner files as single.

b: Single earner files as head of household and claims partner as dependent.

c: Single earner files as single and claims partner as dependent.

71. This is another example of how government policies can promote procreation and the at-home raising of children. To deny such policies to a group of parents and children hurts society, the spouses, the children, and the odds of their having further children.

Mr. Hochberg moved to table the motion because he does not feel well and we don't have time to finish anyway. Ms. Sheldon seconded and spoke in support of the motion to table because the Commission needs to complete the minutes.

Ms. Kreidman asked to discuss this point. She stated that the fact that Mr. Hochberg does not feel well is legitimate. She *asked to first consider* a motion to say we would recess until Monday. Mr. Hochberg seconded the *new* motion. The motion to recess until Monday, November 6, 1995 at 1:30 p.m., Room 1008, State Office Tower passed unanimously.

#### November 6, 1995

The Chair reconvened the meeting at 1:37 p.m. to *continue* the agenda of October 25, 1995. Mr. Britt, Ms. Gomes, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer were present. Ms. Kreidman was excused.

The following materials were distributed: revised schedule; letter from Legislative Reference Bureau Director Wendell Kimura dated November 6, 1995; state library map; Tom Coleman's response to request from Commission; excerpt from Encyclopedia of Financial and Estate Planning.

The Chair reviewed the schedule stating the he recognized it was tight but it has to be met to be able to complete the report. It will be put to a vote on November 8, 1995.

Resuming where we left off on Thursday, November 2, 1995, there is motion to table Substantial Benefit No. 9 by Mr. Hochberg.

Dr. Stauffer noted that the Commission is 26 days behind schedule *and* he would like each discussion to take only 20 minutes. *In speaking against the motion to table, he* directed the Commission to the *chart at the end of Substantial Benefit No. 9*. The *chart* looks at income tax for different kinds of couples and *for* different income situations. Couples of different gender have the choice to have their tax consequences go down or up, *or to otherwise influence their taxes by using their marriage certificates, which same-gender couples are denied*.

The motion to table Substantial Benefit No. 9, income tax table benefits, did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

There was a call for the underlying motion to accept Substantial Benefit No. 9.

Ms. Sheldon asked for clarification that Substantial Benefit No. 9 presumes the federal government will recognize same-sex marriage. Dr. Stauffer says the benefits are based *partially on the* testimony of Mr. Roth that the *Federal benefit* status is driven by state law. Ms. Sheldon stated that the Commission does not have the authority to say the federal government will recognize same-sex certificates and therefore should not accept it.

Mr. Hochberg stated the problem with saying income tax benefits are a major benefit is that, as Randy Roth said, sometimes it is a burden. I could vote to approve this table if it was not attached to the report, because I don't doubt that its true. It's only questionable if its a major benefit.

A call for the question was made.

The motion to accept Substantial Benefit No. 9, income tax table benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Ms. Sheldon voting nay. Mr. Hochberg abstained.

Dr. Stauffer moved to accept Substantial Benefit No. 10, additional income tax benefits. Mr. Britt seconded the motion. Which specifically states:

**Substantial Benefit No. 10: Additional Income-Tax 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 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 considered part of the worker's income unless the spouse is claimed as a dependent. The amount paid out by employers for certified spouse's benefits are, however, 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 tax benefits like these are a substantial benefit.

Dr. Stauffer spoke in favor of the motion, stating that the presumption that if you are married you are automatically presumed economically dependent presents an opportunity to *influence* a couple's tax situation. He *noted* that if someone receives health benefits for their domestic partner, the cost of those benefits are taxable income, *while certifiably married couples are not attributed this income when health benefits are extended to a spouse*. If the marriage is dissolved in divorce, *certain alimony* payments may be tax free. Dr. Stauffer agreed to add citations to the three paragraphs *of the motion*.

Ms. Sheldon moved to table motion until the Commission can determine further information. Mr. Hochberg seconded the motion.

The motion to table discussion of Substantial Benefit No. 10 did not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Ms. Sheldon asked that when the Commission is comparing uncertified relationships with certified relationships are we talking about opposite-sex couples too? Dr. Stauffer confirmed that he's talking about those who would like to be married but can't because they can't have a certificate. Mr. Hochberg asked about those who were heterosexuals. Dr. Stauffer replied that the Commission can address that when we get to that point. Mr. Hochberg asked Dr. Stauffer "What is your intent? Where are you going?" The Chair asked Mr. Hochberg *whether he had received Dr. Stauffer's motions back on October 6th* and Mr. Hochberg confirmed he did.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 10, additional income tax benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 11, estate and gift taxes. Ms. Gomes seconded. The motion specifically reads:

**Substantial Benefit No. 11: Estate/Gift-Tax Benefits**

The Commission makes the following findings, for the information contained in this section:

A legally married person receiving an estate (or total gifts) beyond \$600,000 from his/her spouse does not owe transfer taxes due to the unlimited "marital deduction."<sup>72</sup> Other heirs, including an uncertified spouse, would have to pay transfer taxes on the value of the estate or gifts beyond the \$600,000 ceiling.<sup>73</sup> 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>74</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 the size of their assets.

The truly wealthy have other methods of reducing their estate or gift taxes, and so a pure comparison between a certified couple and an uncertified one is difficult. For example, let us say a certified spouse dies with a billion-dollar estate. Because

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72. Give citation.

73. Give citation.

74. Give citation.

the marriage was certified, there would be no estate tax for the surviving legal spouse. But if the marriage had not been certified, then the surviving spouse would see an estate tax of between 450 and 500 million dollars. That, to say the least, is a substantial benefit.

But for someone having that amount of wealth, we would expect he or she to hire competent legal and accounting experts to devise various legal instruments to reduce some or all of this potential tax liability. The value of a marriage certificate for a billionaire is therefore not automatically worth \$450-500 million. Instead, the value would be the price of paying the experts, plus the price of any remaining estate tax that the experts could not get out of paying.

In this regard, this matter of estate/gift taxes are similar to the marriage-certificate benefits from No. 8 above (savings in creating the relationship). This is to say, by hiring experts, the person of wealth could "replicate" the effects of a marriage certificate.

In this case, however, the cost of the "replication" could easily run millions of dollars. Even so, the couple would see a substantial reduction in the \$450-500 million that would have to otherwise be paid.

In any event, the matter of the "marriage bonus" for purposes of Federal and State estate and gift taxes is substantial. Precise estimates would depend on the variables of the individuals' estates.

Dr. Stauffer spoke in favor of the motion explaining there is a *normally only* \$600,000 exclusion from estate taxes, and *an annual exclusion of just* of \$10,000 *in gifts*. But it is unlimited to married couples.

Mr. Hochberg asked for the citations to this material. Dr. Stauffer said he would supply them.

Mr. Hochberg moved to table the motion until the Commission has the exact citation. Ms. Sheldon seconded the motion.

The motion to table discussion of Substantial Benefit No. 11 does not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Mr. Hochberg reiterated his concerns that were articulated in earlier discussion of other substantial benefits.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 11, estate and gift tax benefits, passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 12, capital-gain tax benefit for a couple's home. Ms. Gomes seconded the motion. Specifically it states:

## **Substantial Benefit No. 12: Capital-Gain Tax Benefit For A Couple's Home.**

The Commission makes the following findings, for this section:

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 time of death of one spouse, the general half-ownership of the house (and other assets) is transferred to the surviving spouse. Normally at this time a capital-gains tax (of 45-50% between the Federal and State tax systems)<sup>75</sup> would become due on the increase-in-value ("capital gain") that belonged to the deceased spouse.<sup>76</sup>

Legal spouses may, however, choose to defer the capital gain tax on the dead spouse's appreciated assets. This free deferral can continue throughout the remaining life of the surviving spouse.<sup>77</sup> 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 they each appreciated an average of about \$200,000.<sup>78</sup>

Taking just 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>79</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 45-50 thousand dollars.

In these cases, the surviving spouse is often 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

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75. Give tax-table citations or tax law citations.

76. 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 do not have an unusual estate except for the appreciated value of their home.

77. Give citation.

78. Give citation.

79. 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.



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.

Dr. Stauffer commented that this benefit is related to death benefits and is a subspecies of it. *A couple's home is often their largest asset. If I die he said, my spouse would be subject to a capital gain on inheriting my portion of the house, were it not for this marriage exclusion.*

Ms. Sheldon spoke against the motion. When you are married you own the property as tenants in the entirety. And most real estate has decreased in value during the last three years. Dr. Stauffer pointed out that he has considered a fluctuating market, see *footnote 76 of these minutes*. Ms. Sheldon disagreed that it is a benefit because the same situation exists for both married and nonmarried couples.

Mr. Hochberg stated that he is a real estate attorney, and that is a not a benefit of marriage, it is a benefit of the type of ownership. Mr. Hochberg continued to say that when a person owns a home and they are married, only because they are married they have the benefit is incorrect.

Morgan Britt called for the question.

The motion to accept Substantial Benefit No. 12, capital gains on the transfer of home benefit passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 13, "tenants by the entirety" benefit. Mr. Britt seconded. Specifically the motion states:

**Substantial Benefit No. 13: "Tenancy by the Entirety" Benefits**

The Commission finds that a very few number of States have a form of ownership of real estate known as "tenancy by the entirety." This bestows unique legal protections and benefits on a certified couple. The 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.

The Commission finds that the benefit comes in the form of protection of the couple's ownership of their house in times of legal attachment. The value is difficult to make with precision, but the Commission finds that it is of significant value.

Dr. Stauffer explained that "tenancy by the entirety" is a benefit that only married people can have. The Chair added that creditors cannot attach to this property. Ms. Sheldon commented that only a few states still have this type of ownership still on the books.

Mr. Hochberg asked if Hawaii had tenancy by the entirety. Dr. Stauffer replied yes.

The motion passed unanimously.

Dr. Stauffer moved to accept Substantial Benefit No. 14, federal benefits. Ms. Gomes seconded the motion. Specifically it reads:

**Substantial Benefit No. 14: Federal Benefits**

The Commission makes the following findings for this section:

The State of Hawaii cannot directly control Federal certified-marriage benefits. However, because Federal benefits currently are granted to certified spouses, and certified spouses are defined as those who are linked together with a valid marriage contract issued from any of the States, then Hawaii can indirectly award these Federal benefits by issuing the certificate. Likewise, Hawaii can deny these benefits by refusing to issue a certificate.

In above categories we have already discussed Federal tax benefits (the basic tax tables, the matter of estate taxes, etc.) including some intangible benefits (such as the special status granted a certified spouse for immigration purposes). There are also 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>80</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>81</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% 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 was 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 would receive nothing.

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80. Give citation for the law. This benefit was discussed by Roth, Randall W. "Testimony to Commission on Sexual Orientation and the Law." Mss. September 27, 1995. [give page number citation.] Also Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

81. 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."

Third, when an insured certified spouse dies, the surviving certified spouse dies, the survivor 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 receive benefits. In 1993, the 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 would receive nothing.

The Disability Insurance system also favors certified couples. If a disabled worker has a legal spouse who is either aged 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 generate significant benefits. 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.

Dr. Stauffer explained that the States's ability to define the status of marriage, confers these Federal benefits.

Ms. Sheldon moved to strike this benefit based on the fact the Commission discussed earlier it would not consider federal benefits. Even if the Commission does consider them, it implies that the federal government will recognize it. Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion stating that the state of Hawaii, by directly granting marriage certificates, is indirectly conferring these benefits. Dr. Stauffer also commented that his further research indicated, regarding *Federal* immigration law, the *national INS* office is *not allowing the Colorado case to influence their decision-making to automatically deny immigration benefits to same-gender married couples.* (See previous discussion of Commission under *Intangible Benefits* on pages 26-27.)

The motion to strike the federal benefits did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Mr Hochberg moved to table the discussion because we don't have the information we need. There have been no testimony to date. Ms. Sheldon seconded the motion to table.

Dr. Stauffer reminded Mr. Hochberg that both *Mr. Roth*, and Sumner La Croix addressed *these* issues. Mr. Hochberg stated the Dr. La Croix did not talk about it when he was here.

Ms. Sheldon asked for the citations for the allegations contained in the middle paragraph. *Dr. Stauffer referred to Dr. La Croix and Lee Badgett's written testimony, and said he would supply the citations.*

There was a call for the question.

The motion to table the discussion on federal benefits does not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Dr. Stauffer called for the question on the underlying motion.

Mr. Hochberg spoke against the motion for all the reasons he spoke for tabling. Ms. Sheldon agreed.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 14, federal benefits, passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to adopt the motion on general benefits. Mr. Britt seconded the motion. It specifically reads:

#### **General Benefits**

The third category of benefits, following those that are intangible and those that are substantial-quantifiable, are the "general benefits." These consist of a relatively large class of legal benefits involving rights that are of limited economic value to the typical married couple, as the rights are used infrequently and/or are small in value.<sup>82</sup>

Five examples follow. Conveyance taxes are usually levied on the sale of real property. Such taxes are not levied on transfers of property between a husband and wife,<sup>83</sup> but such conveyances are infrequent.

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82. List the statutes here, keying on the list from Appendix A. Give an estimate of the total number of general benefits that would follow from this number of statutes.

83. §§247-3(4) & (12), HRS.

A University of Hawaii employee's spouse is exempted from the nonresident tuition differential when the spouse is not a Hawaii resident,<sup>84</sup> but there is likely to be only a few such instances each year.

Election law<sup>85</sup> allows an immediate family member to contribute up to \$50,000 to another immediate family member who is a candidate for public office, which is many times the dollar limit otherwise allowed, but relatively few couples exercise this benefit.

Certain fishing in Hilo bay,<sup>86</sup> and Statewide fishing for Nehu and `Iao (i.e., the *Stolephorus purpureus* anchovy and the *Pranesus insularum* "Silversides" fish),<sup>87</sup> while otherwise prohibited, are allowed for family consumption. With "family" not defined in Chapter 188, HRS, the definition from elsewhere in the HRS is used, meaning a family with a marriage certificate.<sup>88</sup> This makes these "marriage benefits." But again, relatively few legal couples use these benefits.

The Commission, in reviewing all of the listed "general benefit" statutes from footnote 79 above, finds that these laws all individually (or in groups) confer "major legal and economic benefits." Indeed, the Commission finds that economic techniques exist to place a value on all of these benefits.

For example, careful work between economists and marine biologists could estimate the supply of certain fish in Hilo bay, and of Nehu and `Iao in waters around the State. It could then be shown that by denying all non-married families and commercial enterprises the right to fish these species, their supply is therefore relatively high and that the resources of a certified couple, necessary to invest to catch the fish, is relatively low.

Economists could then look at the values of the fish. While these catches cannot be sold on the open market, they represent a "substitute value" in the sense that an equal amount of fish or protein products need not be purchased on the open market for the couple, thus saving them money.

For a certified couple that includes at least one spouse who fishes, the economic value realized by this legal benefit could be substantial,<sup>89</sup> certainly a great deal more than the name-change benefit cited by the Hawaii Supreme Court.<sup>90</sup>

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84. §304-4(b), HRS.

85. §11-204, HRS.

86. §188-34, HRS.

87. §188-45, HRS.

88. Give citation for the statutory construction rule on looking elsewhere in HRS for the definition; plus give the citation that it would be a married family.

89. Still, very few couples with marriage certificates use the marriage fishing benefits conferred by these two laws. If the value of the fish taken by those few couples is then divided by the total number of married couples in the State, the average fishing "benefit" conferred by these statutes, per couple, is relatively small.

90. See the previous discussion of this matter of name changes, beginning on page <?> of this report.

The Commission finds that its resources are limited in carrying out the type of investigation needed to give a precise value estimate for each of these "general" legal/economic benefits. The Commission has instead invested its time on the limited number of benefits, described above, which bestowed relatively larger values upon a more significant number of couples.

Dr. Stauffer explained that the general benefits are the catch-all when you take out the intangible and the substantial benefits. Dr. Stauffer gave *the* five particular examples above. While we are talking about fishing for Nehu and 'lao, which may be manini (*small*), we are talking about small fish but they are not small *benefits* because they *could be major benefits to the affected couples*. These benefits are major to an individual but not for a lot of people.

Ms. Sheldon questioned whether being able to catch fish on your own is was considered a major economic advantage. Dr. Stauffer replied yes.

Mr. Hochberg moved to table for the same reasons stated above. Ms. Sheldon seconded the motion.

The motion to table does not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Mr. Hochberg requested that for the benefit of the legislature, shouldn't the Commission cite Dr. Ghali for this? Dr. Stauffer agreed to add to footnote 79, "For another opinion see Dr. Ghali testimony."

The motion to adopt the general benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Britt moved to recess until the next day, November 7, 1995 at 1:30 p.m., in Room 1008, State Office Tower. Ms. Gomes seconded. The motion passed unanimously.

The meeting recessed at 3:35 p.m.

## November 7, 1995

The meeting was reconvened on Tuesday at 1:40 p.m., in Room 1008, State Office Tower to continue the important matters that were not decided from the agenda of October 25, 1995. *All members were present.*

The next item on the agenda is the memorandum produced by Mr. Britt related to policy reasons. His amended 32-page motion was received by the Commissioners by fax this morning. The public policy report is attached to these minutes as Attachment 5.

Mr. Britt moved that his public policy report be adopted by the Commission subject to later review as appropriate. Dr. Stauffer seconded the motion.

Mr. Britt reviewed the changes from the previous edition. Particularly he referred to certified marriage versus sanctified marriage; the cause to lose jobs discussion on pg. 9; the discussion on the Attorney General's arguments related to biological parents and the government's involvement in procreation as not valid on page 11-12; the Hawaiian custom argument on the bottom of page 13; and the religious argument on page 14.

The Chair pointed out that many of the arguments are related to compelling state interest, is that our job to argue the State's case? Mr. Britt agreed that is was not, but it is important to include it as background information.

Skipping to pg. 25 Mr. Britt read the four policy reasons that were set out. Mr. Britt also amended the work "sex" to "gender" to be more precise.

Mr. Hochberg stated that gender refers to language. Dr. Stauffer says he researched it and agrees with Morgan.

Ms. Sheldon stated that she had some questions. Mr. Hochberg wondered if this report is to provide Dan Foley with information for court instead of being a report to *the* legislature. Mr. Britt responded "No". Mr. Hochberg said he thinks it looks like a document for Dan Foley. Mr. Britt disagreed. To him it is a cut-and-dry argument explaining why benefits are being denied.

The Chair reminded the Commission that the task is to extend or not extend benefits. If there is going to be an minority opinion *then* perhaps that could concentrate on policies not to extend.

Dr. Stauffer pointed out footnote number 10, *in the policy report that is the subject of the motion*. He said the fact that there is the Baehr *decision in place means the Commission can choose to not list reasons in favor of extending marriage rights*, because the burden is now on the State to prove the discrimination is justified and is narrowly drawn *and in order to justify continuing not to extend the benefits.*

Ms. Sheldon asked if it is the Commission's job to impose a burden? Dr. Stauffer believes the Commission needs to respond to what the State says. Mr. Britt added that the Commission is not imposing a burden, the Court has. The Chair clarified that position is in the lawsuit. Ms. Sheldon clarified that's the law suit and this is the Commission. The Chair agreed with Ms. Sheldon's point. Ms. Sheldon further clarified that the Commission is not defending the lawsuit, the State is defending the lawsuit.

Ms. Sheldon believes the statements in Mr. Britt report are conclusory and without background authority. Mr. Hochberg added that the one thing that is troubling is that the bibliography has information on both sides that won't be able to cited, and the two sides won't be able to address. I am expecting one of the heavily cited resources to be Boswell and there are criticisms of his that wouldn't be included in this report.

Mr. Britt explained that as an educator we set up content objectives, then performance objectives. That's how I've approached this. This initial process represents the content objectives. Ms. Kreidman asked aren't we supposed to discuss the policy reasons we're supposed to embrace? The Chair replied "Yes." Ms. Kreidman suggested discussion on the *four* policy reasons listed at the end of *Mr. Britt's policy report that is the subject of the motion*.

Ms. Sheldon offered that she has questions with regard to the Commission's findings. Will the report say the whole Commission? Dr. Stauffer replied that the process is that if the majority of the Commission decides, *the report will say "the Commission finds"*, but the minority still has *the* opportunity to file a report.

Ms. Sheldon reviewed material on page 3 and commented that the history *referred to there* refers to information that wasn't discussed. Dr. Stauffer reminded the Commission that the history section in his *earlier* memos were skipped over in the interest of time, *but they have* been available to read since October 6.

Mr. Britt called attention to page 4, line 8 *and the two ways basic rights are granted*.

Ms. Sheldon objected to comments on page 4, line 12 regarding the 14th Amendment argument, she disagrees on what the Loving case says, referring to Mr. Britt's comments on lines 22 and 23. Dr. Stauffer agreed with Mr. Britt. Mr. Hochberg added that it is important to cite a case for what it says.

Ms. Kreidman interrupted to ask before the Commission goes page by page over Mr. Britt's report, the Commission should decide what we're going to support.

Ms. Sheldon believes that Mr. Britt's report has all these mistaken premises. No defenses were made regarding children, and kids having to go to school with the offspring of homosexual parents. Mr. Britt recalled Sherri's testimony with the children.

The Chair suggested that there be discussion on the issues for at least another hour *and then the Commission should cut off discussion and vote on the motion, but the Commission should address any inaccuracies*.

Dr. Stauffer commented with regard to Ms. Sheldon's 14th amendment reference of Loving's holding *and read from* the very first sentence in the Loving case *that* says it is based on the 14th, and page 11, at the very least....(line 10) Mr. Hochberg offered that "persuasive" is not the same standard as "compelling state interest".

Ms. Sheldon also identified page 5, line 1 as referring to a defense based on religion that does not appear in the *Loving* case. Dr. Stauffer *replied that the trial* court judge quoted the bible, and he thinks the Commission can infer religion was involved.

Mr. Hochberg asked the Commission to decide if they're not going to adopt the language then we don't have to address the language of the report. Dr. Stauffer stated these



twelve things on pages 5 and 6 of the motion were issues that surrounded the case. Although the court opinion didn't directly use the word religion it used a religious argument. Mr. Hochberg offered that the wording would work if it said that "religion played a role" versus "a primary defense" which means the lawyer said it. The Chair confirmed that the exact language of Mr. Britt's report may be adjusted later. Mr. Hochberg reiterated if there are four people who don't want to use the language of this report then the Commission doesn't have to address it.

Dr. Stauffer stated that the Commission should correct inaccuracy, but the Commission doesn't have to adjust style unless clearly warranted, and that the ideas that Mr. Britt has laid out are good. Mr. Britt and Dr. Stauffer both agreed that neither set out to make a legal document in Parts I and II of the report. Neither are attorneys. Again, Mr. Hochberg stated that if there are four people then we don't need to deal with the report. That doesn't necessarily exclude our discussion of the four policies in the end.

Ms. Sheldon asked about page 7, lines 3-12, and then referred to *Baehr* page 557 which says there is no fundamental right to privacy or "otherwise". So the characterization of the argument as a fundamental right is incorrect (see page 557). Mr. Hochberg expanded on this concept. Dr. Stauffer stated that *Baehr*, in its plain language, is based on the plaintiff's civil rights, and as a layman he sees the civil rights involved as a "fundamental right." The Chair suggested moving on.

Mr. Hochberg pointed out on line 10 that "preemptively" should be changed to "presumptively".

Ms. Sheldon pointed out on line 19 that the State is not raising a primary defense based on religion. Mr. Britt agreed to "popular" instead of "primary." Ms. Kreidman queried if the Commission is considering all points of view .

Ms. Sheldon returned to page 7, line 27-30 and stated that just because you raise a public health defense doesn't mean you discriminate. No one said that. Mr. Britt said that he recalled Dr. Kehoe's testimony said something along those lines. Ms. Kreidman said that it sounds like the public health issues versus the health issues may be confused.

Ms. Sheldon moved on to page 8. She stated that nobody said there is gender discrimination. Ms. Kreidman disagreed and recalled the woman with her child, she clarified that is what we're talking about it. Ms. Sheldon disagreed and stated that she thinks we're talking about behavior discrimination. Dr. Stauffer contributed his point of view is *gender discrimination is the same as racial discrimination*. Ms. Sheldon disagreed stating that her point of view is that its an unascertainable behavior. Dr. Stauffer added that so is religion, *which nevertheless is a protected class*. Dr. Stauffer believes that his religion is discriminated against because some of the marriages performed in the church are not recognized by the State. Mr. Hochberg offered that at the beginning of the country they included one unascertainable category and no others, religion.

Mr. Hochberg pointed to page 4, line 1 as inaccurate. There is no such thing as a right to equality. Dr. Stauffer recognized that technically, there is equal protection under the law; to the lay person that means equality. Mr. Hochberg responded that outside of the law, there is no right for equality.

Mr. Hochberg moved to page 5, line 7 and 8, focusing on the defenses: Its immoral not to discriminate versus page 7, lines 25 and 26. He disagrees that anyone said its immoral. Dr. Stauffer disagreed and stated that he heard twenty people say that same-sex marriage was immoral. Mr. Britt agreed with Dr. Stauffer. Mr. Hochberg clarified that they didn't say it was immoral if you grant these licenses. Dr. Stauffer disagreed. Ms. Gomes disagreed with Dr. Stauffer, she remembers that those testifiers said homosexuality is immoral, not the granting of the license that is immoral. Dr. Stauffer concluded that they didn't care if a license was granted to same-sex couples. Mr. Hochberg stated that his recollection was that people thought that homosexuality is immoral and the State should not grant licenses to same-sex couples. They didn't say it is immoral not to discriminate against them.

Ms. Kreidman questioned Mr. Hochberg if *he* could see how those two ideas are bound together. Ms. Sheldon clarified that *even without the* religious school, most people believe that the conduct is immoral. Mr. Britt generalized that for these people it is probably true that any sex that is different is repugnant to normal heterosexual sex, but the private relationships have nothing to do with whether or not two people want to have a recognized relationship.

Ms. Sheldon began to speak on tradition, and Mr. Britt finished that tradition is not a good reason. Ms. Sheldon stated that if that is true then more groups will want protection. Soon pedophiles will be binding together to argue for more rights. Ms. Kreidman pointed out the difference to that situation is that children don't have any power. Ms. Sheldon stated that both are traditionally abhorrent behaviors. Ms. Kreidman asked abhorrent to who?

The Commission recessed at 3:00 and reconvened at 3:06.

Ms. Martin warned that the tape machine we have had the privilege to be using will not be available for the 8th and 9th. Mr. Britt mentioned that he has an appointment this afternoon, so he would like to cut off discussion in fifteen minutes and take a vote.

Mr. Hochberg suggested looking at the specific policies in the end. I wouldn't be able to accept the policies because I don't agree with the background material. Ms. Sheldon agreed. She also pointed to pg. 8 line 23-25. When has this been experienced? Mr. Britt recalled he heard testimony saying that Hawaii would be a Sodom and Gomorrah place. He is willing to cite the testimony.

Ms. Sheldon asked if Mr. Britt ever had an experience where he wasn't allowed to eat in a restaurant? Ms. Gomes said she had experienced it once in San Francisco. Ms. Sheldon asked if it ever happened in Hawaii. Mr. Britt replied at the Cracker Barrel.

Ms. Kreidman confirmed that the policies listed are the reasons we would be asserting that are legitimate to extend benefits to same-sex couples.

Mr. Hochberg, in reviewing the first of the policies, stated that all people in Hawaii are not free from discrimination. *Baehr v. Lewin* says you can discriminate if there is a compelling state interest that is narrowly drawn. He also stated that the constitution provides protection based on sex, not gender, so if you use the word "gender" you're wrong. Dr. Stauffer suggested adding "illegal" in front of discrimination.

## **Policy No. 2**

Mr. Hochberg referred to lines 30-31 and stated that this relates to the earlier discussion on the *Baehr* case. He asked if the purpose of the policy reason is to affect the litigation and strip the Attorney General of the State's defense. Mr. Britt replied that the discussions Mr. Hochberg is referring to are background material to substantiate the policy. Mr. Hochberg reiterated his question in terms of if Mr. Britt knew this would strip the State's case would Mr. Britt want to include it? Mr. Britt replied that he did not consider it that way. The Chair confirmed that this is not the place to try the case. Ms. Kreidman stated that just because Dan Foley marches our report over to the court it doesn't mean the court will look at it. Mr. Britt stated he would be flattered.

Ms. Sheldon asked Mr. Britt to clarify what is background and what is policy. Mr. Britt started to explain that religion, morals and public health are not valid reasons to not extend benefits. The Chair interrupted and stated that he was being arbitrary and as time runs out the Commission needs to proceed to Number 3.

Ms. Sheldon objected that she is being asked to comment on a document that she just got this morning. She registered her objection to being railroaded into a vote.

## **Policy No. 3**

Mr. Britt read Policy No. 3, relating to procreation. Mr. Hochberg restated his objections to Policy No. 3 on all the levels he objected to Policy No. 2. Ms. Kreidman asked Mr. Hochberg if he was suggesting something different. She reminded him that just because the State decides to put forth an argument doesn't mean that the Commission can't discuss it. Mr. Hochberg stated that the legislature will see that we disagree with the Attorney General's point of view.

## **Policy No. 4**

Policy No. 4 was read. Mr. Hochberg stated that many of our laws are rooted in the Judeo Christian history. We do it all the time.

The Chair reminded the Commission that the motion pending is to adopt the report including the four policy statements.

Mr. Britt called for the question.

The motion to adopt the public policies as amended passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Ms. Sheldon stated that she has been trying to get a doctor she had wanted to testify, but he is unable to attend. Dr. Stauffer asked about *now proceeding to approve* the minutes. The Chair suggested, in light of the regularly scheduled meeting tomorrow, postponing the approval of the minutes until the November 22, 1995. Dr. Stauffer moved to adjourn. Mr. Britt seconded. *Motion passed unanimously.*

SUGGESTED AMENDMENTS TO THE MINUTES of October 11-12 AS DRAFTED

- Page 1: Seven lines from the bottom, at the end of the line change "Bob" to "Robert"  
Next line capitalize "u" in Diana Pau U.
- Page 5: Paragraph just above "II Voting..." that starts Mr. Morgan. Change to Mr. Britt.
- Page 6: The fourth paragraph after "III Discuss...", the second sentence to read  
"Assuming that all things are equal, it is the State's position that current legislative policy is that children of Hawaii are better off being raised by their biological parents in single home, recognizing that there is divorce, adoption, single parents and biological parents that may not be the best for children."
- : Last paragraph, first sentence. Add "so as" to make it read "Mr. Michaels continued to explain that the marriage law operates to be over-inclusive so as not to violate the civil liberties of the opposite-sex couples who would not have children."
- Page 7: Second paragraph. Second sentence add "He suggested" in front of "if" to read "He suggested if same-sex marriage..." then in front of the next sentence add "If" to read "If this de-stabilization and legal....."
- Page 8: First paragraph, first sentence to add "U.S. Supreme" to read "Mr. Hochberg paraphrased the U.S. Supreme Court's lesson in..."
- Page 10: Fourth full paragraph, second sentence replace "homosexual" with "gay and lesbian" to read "His Buddhist community supports members of the gay and lesbian community who wish to marry.... to extend legal and economic benefits to gay and lesbian couples.
- Page 11: Second paragraph, first sentence, for clarity: Sister Chatfield, speaking from a pastoral point of view, would like to see the Commission support something that brings two individuals to a stable relationship. She asked the Commission to consider cleaning up the current marriage law if that is how the Commission chooses to extend benefits because the marriage law is often used as a bludgeoning tool today.
- Page 12: Three lines from the bottom, correct the spelling of "convaluted" to "convoluted"

Attachment 1

Partial List of Requested Changes to Minutes  
of October 11, 1995 Commission Meeting

Moheb Ghali, one of the economists who testified before the Commission, explained 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. Where an expected value of some benefit might be worth \$500 to a person who actually takes advantage of the benefit, if the probability of someone taking advantage of the benefit is say 1 in a 1000 chance, the expected value of that benefit is only \$0.50 ( $\$500 \times .001$ ). The probability of use of a particular benefit is further reduced where the benefit requires special status before it becomes available to the general public. 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 to the ratio of the number of U.H. professors to the population at large.

Dr. Ghali also explained that most of the benefits addressed by Dr. La Croix, the other economist who testified at the commission, concern estate planning techniques or contract rights 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 in stationary stores, trusts, durable powers of attorney, living wills and other contracts are the remedies available to all unmarried people without regard to their sexual orientation. In Dr. Ghali's opinion, the data or measurement of the value of these small benefits (saving the cost of these widely used remedial measures) is not warranted in light of the cost to do the research.

Dr. Ghali also clarified that the Employee Retirement System permits every member to designate anyone as the beneficiary: a spouse, domestic partner or anyone else. Thus by and large, there are not additional benefits to be realized in the ERS pension plan. The exception is an in-service death benefit in noncontributory plans which Dr. Ghali also as discussed.

Of the benefits listed in the LRB 15 page summary, Dr. La Croix identified only nine "[b]enefits from Marriage with a Significant Expected Value." Of those, Dr. Ghali testified that:

"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

Attachment 2

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." (see page 2 of Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners").

However, Dr. Ghali agrees that three benefits addressed by Dr. La Croix merit investing the resources to research the economic value. Those benefits were: Retirement Health Insurance Benefits, Non Retirement Health Insurance, ERS Death Benefits, and Hawaiian Home Lands Leases. Dr. Ghali opined that none of the other benefits can possibly be large enough to bear the cost of the analysis needed to determine the economic value, and therefor do not constitute major legal or economic benefits.

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

Concerning the ERS Death Benefits, Dr. Ghali discussed Mr. Shimabukuro's testimony that the benefits payable upon the death in-service of an employee are only available to the surviving spouse (until remarried) and the dependent children (until 18 years old) if the employee was under the non contributory plan. The only benefit exclusive to spouses under the contributory plan is an additional pension. Dr. Ghali explained how to measure the economic value of this benefit:

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.

Concerning the Hawaiian Home Lands Lease issue, Dr. Ghali opined that the cost to 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 stated that data on the excess demand for Hawaiian Home Lands parcels be analyzed. The value of the Hawaiian Homes Land lease cannot be said to be a major benefit. Dr. Ghali suggested that:

To evaluate this potential benefit, one needs to know the frequency of domestic partnerships that occupy Hawaiian Homes Lands properties at this time. An opinion survey of Hawaiian community attitude towards granting the rights to domestic partners of Hawaiians in preference to there 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.

Dr. Ghali agreed with the prior testimony of Dr. La Croix and Professor Roth that the tax code both benefits and burdens married and unmarried couples depending on the taxable income rather than the marital status. Dr. Ghali also agreed that neither this commission nor the state legislature can modify the U.S. Internal Revenue Code. Therefore, there is no economic benefit to be gained from the IRC by creation of domestic partnerships which is not synonymous with marriage under the Code. Were domestic partners to actually marry, whether they benefit or are burdened depends on their relative incomes. Unless data show that most or all same-sex couples have greatly unequal income, Dr. Ghali agreed with Professor Roth and Dr. La Croix that there is no reason to assume a general tax benefit from marriage.



11/1/95

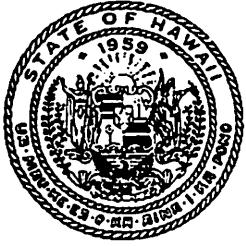
PROPOSED POLICY STATEMENT ON THE ECONOMIC EFFECT OF  
LEGALIZING SAME-SEX MARRIAGE ON TOURISM IN HAWAII

Whether economic effect, or lack of it, is a "policy" which should be identified and analyzed under item (2) of Act 5 is, of course, arguable. However, if a given action by the legislature were to cause a loss of jobs or income it would be opposed as bad for the community and support a "policy" in opposition to such action. Conversely, if such action created additional jobs and income, and therefore better living conditions for the average citizen, it could be seen as good "policy" to encourage and support it.

While the effect on tourism--presently Hawaii's prime source of income--of legalizing same-sex marriage has been hotly argued, the weight seems on the side of greater benefits for the industry. While the numbers of such tourists could be substantial, their numbers as a proportion of total tourists coming to Hawaii, would probably be relatively modest. Such an influx would not necessarily cause a decrease in other tourists. (as basis for findings note articles in Southern California Law Review, Vol. 68, Maryland Law Review, Vol 53, and materials submitted by La Croix, Mak, & Ghali)

Therefore the Commission finds that the legalization of same-sex marriage, or the creation of a comparable legal status, would probably benefit Hawaii's economy, and it would be appropriate public policy to support such legislation.

Attachment 3



**THE COMMISSION ON  
SEXUAL ORIENTATION AND THE LAW**

c/o Legislative Reference Bureau  
State Capitol, Room 446  
Honolulu, Hawaii 96813  
Telephone: 587-0666  
Facsimile: 587-0681

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**NEWS RELEASE**

Contact: Pamela Martin  
Phone: 587-0666

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Thursday, November 2, 1995

**The Commission on Sexual Orientation and the Law continues the October 25, 1995 meeting until November 6, 1995, to finish addressing important matters not decided .**

The Commission on Sexual Orientation and the Law gave formal notice of a meeting convened on October 25, 1995. The Agenda and Notice of the meeting are attached to this release. The Commission has continued the meeting and has reconvened on October 26, and November 2 in their effort to address items on that agenda of reasonably major importance not decided. The Commission would like the public to know that the Commission has unanimously moved to recess and reconvene the meeting on November 6, 1995 at 1:30 p.m. in Room 1008, Leiopapa A Kamehameha Building, 235 S. Beretania Street, Honolulu, HI 96813. This meeting is a continuation of the meeting of October 25, 1995 and as the opportunity for public testimony has already been handled the items left on the agenda for November 6, 1995 do not include time for oral public testimony. The public is nevertheless encouraged to attend and submit written testimony. Those who would like an opportunity to testify on items on the agenda before the Commission in person should appear at the next regular meeting November 8, 1995, Room 329, State Capitol, at 9:00 a.m. That notice and agenda is also attached to this release.

Attachment 4

1 Note that all **Sans-serif**  
2 **BOLD face** is additional  
3 copy I have added since I  
4 originally began working on  
5 this draft. Anything else,  
6 including the Shadow face  
7 copy, is from a previous  
8 draft which you should  
9 already have.

10

11

*M.B.*

(no Page 1)

## Motion:

I move that the following public policy report be adopted by the Commission (subject to later review and amendment as appropriate).



"Examination of the Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits, In Part or In Total, to Same-Gender Couples."

## Introduction

The Commission finds that substantial public policy reasons exist to extend all the legal and economic benefits discussed in **Part I of this report** to same-gender couples willing to enter into the marriage contract, with all the responsibilities and burdens which that contract entails.

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



## Background:

### The 14th Amendment

**The Commission has** previously discussed the historical parallels between Hawaii's situation and that of 17th century England's refusal to grant government marriage certificates to married couples professing the wrong religion.

Great Britain does not have a Constitution, but the U.S. and the State of Hawaii do, and each of the latter documents have enshrined within them a groups of fundamental benefits of citizenship known as the Bill of Rights. **The Commission finds that these** stand senior to legislative law, and define the basic liberties we hold to be self-evident.

1 Key in this case, **the Commission finds**, is the right to equality,  
2 sometimes called equal protection under the law. Within the U.S.  
3 Constitution, this right is contained within the 14th Amendment, adopted  
4 on July 21, 1868. It states in relevant part: "No State shall ... deny to any  
5 person within its jurisdiction the equal protection of the laws."<sup>1</sup>

6 The amendment was passed after the Civil War, and was primarily  
7 designed to guarantee the rights of freed slaves. The amendment did this  
8 in at least two ways. Another portion states, "All persons born ... in the  
9 United States ... are citizens of the United States" and, "No State shall  
10 make or enforce any law which shall abridge the privileges or immunities  
11 of citizens of the United States."<sup>2</sup>

12 This granted basic rights. The equal protection section, cited above,  
13 provided the second degree of insurance that the freed slaves would have  
14 the right of equality.

15 **The Commission finds importantly, that** the amendment was not  
16 designed to allow inter racial marriage. Indeed, it is thought that the  
17 amendment may not have passed if this aspect had been brought up.

18 **The Commission finds that it** took almost a century until 1967  
19 before the U.S. Supreme Court applied the 14th Amendment's guarantee  
20 of equal protection to the topic of interracial marriage and ruled that the  
21 amendment does apply, and that State miscegenation laws (those banning  
22 interracial marriage) should be abolished as running counter to the  
23 fundamental human right of equal protection under the law.<sup>3</sup>

## 24 ***The Loving Case***

25 The Hawaii Supreme Court in its **Baehr** decision<sup>4</sup> referred to this  
26 U.S. 1967 "**Loving**" case, which dealt with Virginia's marriage law that  
27 limited the legal and economic benefits of governmental certification to  
28 certain couples on the basis of race, thereby prohibiting equality to couples  
29 of the wrong race.

30 **The Commission finds that there is much to learn from a review**  
31 **of the *Loving* case and that the parallels between the *Baehr* and**  
32 ***Loving* case are very strong.**

1 A primary defense cited by Virginia was one based on religion: that  
2 the majoritarian religious belief of her citizens was in favor of the racial  
3 limitation.

4 A second Virginia defense was one of **definition: certified** marriage  
5 was a union of two people of the same race, by one definition, and this  
6 definition should not be violated.

7 Morality formed a third defense: it was immoral not to discriminate  
8 on a basis of race, many people said.

9 Public health and safety formed a fourth defense: some or most peo-  
10 ple said that discriminating on a basis of race was good for the public  
11 health as it would not produce mongrel and weak children and **also** would  
12 prevent further interracial sexual relations, etc.

13 A fifth defense was related and revolved around pro creation: a good  
14 many, perhaps a majority, felt that it was bad for the proper procreation  
15 of the races to allow such discrimination to end.

16 The protection of children and ensuring that they would be raised in  
17 a healthy environment formed a sixth defense: it was argued that if the  
18 racial discrimination were ended, it would harm children.

19 A seventh defense was pure public opinion: a majority of Virginia's  
20 citizens were in favor of the discrimination.

21 Public order formed an eighth defense: society's basic structure  
22 would be undermined, it was said, if the discrimination were ended.

23 A ninth defense was one, oddly enough, of equality: all people were  
24 equal under the law because the different races were equally discriminated  
25 against as each could not **certifiably** marry across racial lines.

26 A tenth defense was one of individual rights: if such **certified**  
27 marriages were allowed, then employers would soon find themselves  
28 having to keep on the payroll workers who were entering into such  
29 marriages, while those marriages might deeply violate the  
30 religious/ moral/ etc. values of the employer.

31 Likewise, or so the tenth defense went, parents would find their chil-  
32 dren having to attend schools with the offspring of such **certified**  
33 marriages. Or having to attend schools with teachers who were in such

1 marriages. And while churches were free to exclude such people, they  
2 would be under intense pressure not to discriminate once such **certified**  
3 marriages became common.

4 Likewise, owners of restaurants or hotels would probably have to  
5 allow such couples to eat or sleep in their establishments, thus perhaps  
6 scaring away their other customers.

7 Closely related was an eleventh defense: special rights. This argu-  
8 ment stated that by taking away others' individual rights (as listed above),  
9 the court would be giving special rights to the couples who insisted on get-  
10 ting their marriages certified. In short, this argument theorized that rights  
11 were a fixed amount of benefits and that by taking from one group, special  
12 rights were being extended to another group.

13 Also related to these defenses was a twelfth one: that the Virginia  
14 economy faced economic hardship if such discrimination were ended.

## 15 **The Hawaii State Constitution**

16 **The Commission finds that upon** its initial adoption in 1959, the  
17 Hawaii State Constitution included a part that guaranteed equal  
18 protection under the law which was modeled after that part of the U.S.  
19 14th Amendment, i.e., "No person shall be ... denied the equal protection of  
20 the laws."<sup>5</sup>

21 And whereas the other portion of the U.S. 14th Amendment, cited  
22 above, was designed to deal with guaranteeing the rights of the former  
23 slaves (i.e., prohibiting discrimination on a basis of race), the Hawaii  
24 Constitution extended this to prohibiting discrimination on a basis of gen-  
25 der, a fundamental right that still does not exist in the U.S. Bill of Rights:  
26 "No person shall ... be discriminated against in the exercise ... [of the laws]  
27 because of race, religion, sex or ancestry."

28 The Hawaii Constitution strengthened its gender protections in 1978  
29 with passage of an "equal rights amendment" which states: "Equality of  
30 rights under the law shall not be denied or abridged by the State on ac-  
31 count of sex."<sup>6</sup>

32 **The Commission finds that, as** with approval of the U.S. 14th  
33 Amendment (whose supporters did not entertain ending racial  
34 discrimination in marriage), it appears equally clear that the Hawaii

1 supporters of the State's special gender guarantees, and equal protection  
2 guarantees, did not entertain ending gender discrimination in marriage.

3 **The Commission finds that, if** it took almost a century for the U.S.  
4 14th Amendment to be applied to marriage on a basis of race **in the *Loving***  
5 **decision**, it took only 15 years for Hawaii's constitutional guarantees to be  
6 applied to marriage on a basis of gender. In the ***Baehr*** decision, the  
7 Hawaii Supreme Court **applied** the guarantees of equal protection cited  
8 above **to** the topic of same-gender marriage and ruled that the  
9 Constitution does apply, and that State law banning same-gender mar-  
10 riage is discriminatory and preemptively unconstitutional **as it runs**  
11 counter to the fundamental human right of equal protection under the  
12 law.<sup>7</sup>

13 In short, the court dealt with the Hawaii marriage law<sup>8</sup> that **had**  
14 limited the legal and economic benefits of governmental certification to  
15 certain couples on the basis of gender, **and which had therefore**  
16 **prohibited** equality to couples of the wrong gender.

17 **The Commission finds that** the parallels to the previous ***Loving*** case  
18 are noteworthy:

19 A primary defense for the current law is one based on religion: that  
20 the majoritarian religious belief of the State's citizens are in favor of the  
21 gender limitation.

22 A second defense is one of **definition: certifiable** marriage is a union  
23 of two people of different gender, by one definition, and this definition  
24 should not be violated.

25 Morality forms a third defense: it is immoral, some say, not to dis-  
26 criminate on a basis of gender.

27 Public health and safety forms a fourth defense: discriminating on a  
28 basis of gender, some say, is good for the public health as it will not pro-  
29 duce confused and weak children, will prevent further same-gender sexual  
30 relations, etc.

31 A fifth defense is related to the fourth, and revolves around procre-  
32 ation: it is bad for proper procreation, **some say**, to allow such  
33 discrimination to end.



1 The protection of children and ensuring that they will be raised in a  
2 healthy environment forms a sixth defense: it is argued by some that if the  
3 gender discrimination were ended, it would harm children.

4 A seventh defense is public opinion: depending on how the survey  
5 questions are formed, a majority of Hawaii's citizens are in favor of the  
6 discrimination.<sup>9</sup>

7 Public order forms an eighth defense: society's basic structure will be  
8 undermined, **some say**, if the discrimination were ended.

9 A ninth defense is one of equality: all people are equal under the law  
10 because the different genders are equally discriminated against as each can  
11 not **certifiably** marry across gender lines.

12 A tenth defense is one of individual rights: if such marriages were  
13 allowed, then employers would soon find themselves having to keep on the  
14 payroll workers who were entering into such marriages, while those  
15 marriages might deeply violate the religious, moral **or personal** values of  
16 the employer.

17 Likewise, or so the tenth defense goes, parents will find their children  
18 having to attend schools with the offspring of such **certified** marriages. Or  
19 attending schools with teachers who were in such marriages. Churches  
20 are free to exclude such people, of course, but they would be under intense  
21 pressure not to discriminate once such **certified** marriages became  
22 common.

23 Likewise, owners of restaurants or hotels will probably have to  
24 allow such couples to eat or sleep in their establishments, thus perhaps  
25 scaring away their other customers.

26 Closely related is an eleventh defense: special rights. This argument  
27 states that by taking away others' individual rights (as listed above), the  
28 court will be giving special rights to the couples who insisted on getting  
29 **their marriages certified**. In short, this argument theorizes that rights  
30 are a fixed amount of benefits and that by taking from one group, special  
31 rights are being extended to another group.

32 Also related to these defenses is a twelfth one: that the Hawaii econ-  
33 omy faces economic hardship if such discrimination is ended.

# The Fundamental Finding of Public Policy

The Commission finds that the fundamental fact in this issue is that the Hawaii Supreme Court has ruled that denying governmental certification to married couples on the basis of gender is discriminatory and presumptively unconstitutional. The Commission further finds that a reading of history supports this finding of the court, and the Commission, upon examination, supports this conclusion of the court.

The question before the Commission then becomes not "what reasons exist to extend the benefits," but rather "what compelling state interests exist to deny extending the benefits?"<sup>10</sup>

Put another way, the Commission has examined whether substantial public policy reasons exist to extend the legal/economic benefits above to same-gender couples, and has found that the senior public policy reason in this area is that our government should not, must not, and shall not discriminate. Further, that these benefits should be extended to these marriages and families, based on the senior public policy reason that it is discriminatory to do otherwise.

**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 support a "policy" in opposition to such action. Conversely, if such action created conditions for the average citizen, it could be seen as good "policy" to encourage and support it.**

**While the effect of tourism - presently Hawaii's prime source of income - of legalizing same-sex marriage has been hotly argued, the weight of expert study and testimony is on the side of greater benefits for the industry. While the numbers as a proportion of total tourists coming to Hawaii, would probably be relatively modest. Such an influx would not necessarily cause a decrease in other tourists.<sup>11</sup>**

**Therefore, the Commission finds that the legalization of same-gender marriage would probably benefit Hawaii's economy and it would be appropriate public policy to support such legislation.**



## 1 **Alleged Compelling State Interests**

2 First Deputy Attorney General Steven Michaels has testified to the  
3 Commission that the State has rejected most of the twelve possible  
4 defenses described above.<sup>12</sup> At this time the State lists just defenses five  
5 (procreation) and six (protection of children).<sup>13</sup> Mr. Michaels also added  
6 a thirteenth, protecting Hawaii marriage certificates from becoming  
7 unrecognized in other jurisdictions.

8 The Commission has examined all three of these alleged compelling  
9 state interests and finds none of them to be compelling.

10 The Commission finds that two of these were raised during the pub-  
11 lic debate that culminated in the earlier **Loving** case and **both** were rejected  
12 by the U.S. Supreme Court, and rightly so. The third argument,  
13 recognition in other jurisdictions, was not involved with **Loving**, but the  
14 Commission finds it to not have merit.

### 15 **Defense #5 : Procreation**

16 The Commission has found above<sup>14</sup> that it is in the public interest to  
17 support the procreation of children, and that the government is hindering  
18 this public interest by denying certificates to same gender married couples  
19 and families.

20 The Commission therefore agrees that procreation is a  
21 public interest, but finds that it is a public interest that  
22 favors the conferring of government certification of same-  
23 gender marriages. The Commission further finds that the  
24 continuation of the current gender discrimination and denial  
25 of equal rights is harmful to the public interest.

### 26 **Defense #6 : Protection of Children**

27 Likewise, the Commission has found above<sup>15</sup> that it is in the public  
28 interest to support the protection of children, but that the government is

1 hindering this public interest by denying benefits to the children of same-  
2 gender married couples.

3 The Commission therefore agrees that protection of children is a  
4 public interest, but finds that it is a public interest that favors the confer-  
5 ring of government certification of same-gender families. The  
6 Commission further finds that the continuation of this discrimination and  
7 denial of equal rights is harmful to the public interest.

### 8 ***Defense #13 : Recognition of Certificates***

9 The Commission finds no evidence that granting equal rights will  
10 lead to a refusal to recognize existing Hawaii marriage certificates, or the  
11 recognition of Hawaii marriage certificates of different gender couples in  
12 the future. The historical record is very clear about this: during the years of  
13 the miscegenation laws, no wholesale refusal to recognize certificates by  
14 any State was ever allowed by the Federal courts.

15 Specifically, as late as 1948, the Commission finds that **30** of the **48**  
16 States did not **certify** marriages that violated their racial discrimination  
17 laws. Hawaii, then a territory, therefore joined just **18** other States that  
18 granted such certification.

19 **The Commission finds that some** or all of the **30** other States did  
20 not accept such racially equal certificates from Hawaii. But this did not  
21 mean such States refused **the rest** of Hawaii's certificates.

22 **The Commission further finds all** of this was well settled in **the**  
23 Federal courts, and the body of case law and scholarly reference books on  
24 the topic is quite extensive.<sup>16</sup>

25 Therefore, the Commission finds that there is no basis for raising this  
26 matter of an allegedly threatened public interest.

## 27 ***Additional Findings***

28 More particularly, the First Deputy Attorney General has explained  
29 to the Commission that the State's position on procreation and protection  
30 of children deals not with sexual orientation, per se, nor even with gender,  
31 per se. Instead, it is based on the belief that being raised by biological par-  
32 ents is best for the child (and so should receive public benefits) and that

1 being raised by non-biological parents is not the best for procreation and  
2 the protection of children and should not receive public benefits.<sup>17</sup>

3 The obvious question is raised concerning those different-gender  
4 couples which apply to get their marriages certified by the government  
5 (and hence are able to receive public benefits) and which may not have  
6 children, or intend not to have children, or are incapable of having chil-  
7 dren. The First Deputy Attorney General addresses this issue by appealing  
8 to a related defense of privacy.<sup>18</sup>

9 The Hawaii Constitution has a very strong constitutional protection  
10 of privacy.<sup>19</sup> This right of privacy has been interpreted as including the  
11 right to procreation or against procreation and for privacy in general con-  
12 cerning reproductive matters.<sup>20</sup> Therefore, the First Deputy suggests, it  
13 would be unconstitutional to question different-gender couples requesting  
14 their marriages to be certified as to whether or not they could or would  
15 have children.<sup>21</sup>

16 On its face, **the Commission finds that this dual argument of**  
17 **biological parents and privacy** is an amazing defense. Followed to its  
18 logical conclusion, **the Commission finds that** a different-gender couple  
19 seeking a certificate, if either one of them had custody of children for any  
20 reason, would **generally** be denied the certificate on the grounds that it  
21 was not in the public interest to let them raise such children as both of them  
22 **would generally not be** the biological parents of the children.

23 Likewise, **the Commission further finds that** under this rationale,  
24 the State should cancel the certificate for any couple attempting to adopt  
25 any child on the basis that it is not in the State's interests to have them  
26 **remain certified while they** raise such non-biological children.

27 On the other hand, **the Commission finds that** the right of privacy  
28 involves freedom from State interference in reproductive matters. On its  
29 face, a different-gender couple with the female past menopause, would be  
30 historically thought to be incapable of bearing children. The State **has**  
31 historically **allowed** such marriages to be certified, however, as the area of  
32 reproduction is private.

33 With modern technology, **the Commission finds** that such a female is  
34 capable of childbirth. **The Commission further finds that the** same is true  
35 of different-gender couples with a male incapable of producing sperm: the

1 child may not be technically the biological offspring of the male in the  
2 marriage, but childbirth is still possible.

3 **The Commission concludes that the** government simply should not  
4 and cannot Constitutionally get involved with the details of reproduction  
5 **even if this means allowing children to be born who are not the**  
6 **biological offspring of both parents. The Commission finds that it is**  
7 unconstitutional to do so, as the First Deputy Attorney General correctly  
8 argues.

9 Therefore, **the Commission finds** the government should not and  
10 cannot get involved with the details of reproduction in a same-gender  
11 marriage. **The Commission further finds that** today medical science  
12 allows same-gender female couples to have all the children they want, so  
13 at a minimum, the State would have to allow same-gender female couples  
14 to have certificates **under the First Deputy Attorney General's**  
15 **rationale. And in the light of post-menopausal childbirth,** who is to say  
16 what medical science will not be able to accomplish eventually with same-  
17 gender male couples? And, at the least, privacy rights prevent us from  
18 investigating further. **Therefore, the Commission concludes that** same-  
19 gender male couples should be allowed certificates.

20 **The Commission also concludes that the First Deputy Attorney**  
21 **General's argument would support granting certificates to same-**  
22 **gender couples, as shown above, and would therefore result only in**  
23 **the practice of denying certificates to those couples adopting children,**  
24 **whether the couple is different- or same-gender.** The Commission  
25 questions **this** argument that non-biological children should not receive  
26 benefits. **Traditionally, our society has granted full benefits to legally**  
27 **adopted children, and the Commission finds no reason, on account of**  
28 **Baehr, to now deny these benefits.** Social science research suggests that  
29 children adopted soon after birth have no lasting effects of not being raised  
30 by their biological parents. The same is true of children raised by such  
31 adoptive (by one or both parent) children whether the parents are different  
32 gender or same-gender.<sup>22</sup>

33 **Furthermore,** the Commission finds that due attention should be  
34 placed on traditional Hawaiian custom:

35 The State reaffirms and shall protect all rights, customarily and  
36 traditionally exercised for subsistence, cultural and religious  
37 purposes and possessed by ahupua'a tenants who are descendants of

1 native Hawaiians who inhabited the Hawaiian Islands prior to 1778,  
2 subject to the right of the State to regulate such rights. (**Article 12,**  
3 **Section 7, of the Hawaii Constitution**)

4 and

5 The common law of England... is declared to be the common law of  
6 the **State** of Hawaii in all cases except as otherwise expressly  
7 provided... established by Hawaiian usage. (§ 1-1, HRS)

8 The Commission also finds that in traditional Hawaiian culture a  
9 great number, perhaps the majority, of children were raised not directly by  
10 the biological parents, but instead by the **hanai** parents. This traditional  
11 custom and practice, the Commission finds, is well documented in the  
12 literature. (*give citations*)

13 The Commission **concludes** that the alleged State interest of  
14 **penalizing** (through the refusal to grant benefits) non-biological parents  
15 for raising children runs counter to the Hawaii Constitution and State law  
16 cited above. **Therefore, the Commission finds that for this additional**  
17 **reason, above and beyond any other, this defense concerning**  
18 **biological children** cannot be considered a compelling interest.

19 **The Commission also finds that the Hawaii Constitution protects**  
20 **religions. Article I, Section 5, of the Constitution states in applicable**  
21 **part: "No person shall ... be discriminated against in exercise ...**  
22 **because of race, religion, sex or ancestry"** (*emphasis added*).

23 **The Commission also finds that those religious groups that are**  
24 **opposed to same-gender marriage are allowed to marry different-**  
25 **gender couples and have those marriages certified by the**  
26 **government, but those religious groups that agree with same-gender**  
27 **marriage are only allowed to marry same-gender couples but cannot**  
28 **have those marriages certified by the government. The Commission**  
29 **concludes that this is a matter of religious discrimination against**  
30 **those religious groups whose beliefs and practices support same-**  
31 **gender marriage.**

32 **The Commission also finds that to say both religious groups are**  
33 **equally discriminated against in the practice of their religious beliefs,**  
34 **because neither can certify same-gender marriages, is not persuasive**  
35 **for the same reasons it is not persuasive on a basis of racial**  
36 **discrimination or on a basis of gender discrimination.**

1       **The Commission also finds that religious belief, like a person's**  
2 **race or gender, is accorded the highest level of protection by the**  
3 **State's constitution, and requires the discriminator to prove a**  
4 **compelling public interest to justify the discrimination.**

5       **For this religious discrimination, the Commission finds that First**  
6 **Deputy Attorney General has provided no alleged compelling public**  
7 **interests other than those examined above, and the Commission has**  
8 **already found those alleged interests not to be compelling.**

9       **The Commission concludes that the alleged State interests in**  
10 **favor of discriminating against certain religious beliefs and practices,**  
11 **by refusing to certify marriages performed by certain religious**  
12 **groups run counter to the Hawaii Constitution. Therefore, the**  
13 **Commission finds that for this additional reason, above and beyond**  
14 **any other, the State's defenses cannot be considered compelling**  
15 **interests.**

16       In conclusion, the Commission finds the specifics of the State's pro-  
17 creation/children defense, including the related privacy defense, not to be  
18 compelling.

19       While the Commission agrees that procreation, the protection of  
20 children, privacy, **the protection of Hawaiian religion and culture, and**  
21 **the protection of general religious belief and practice,** are all in the  
22 public interest, the Commission also finds that these three issues of public  
23 interest **raised by the First Deputy Attorney General, and the three**  
24 **issues raised above by the Commission, all** argue for the conferring of  
25 government certification **on** same-gender marriages and not against. The  
26 Commission further finds that the continuation of the current gender **and**  
27 **religious** discrimination, and denial of equal rights is harmful to the public  
28 interest.<sup>23</sup>



## 29       **Other Alleged Compelling State** 30       **Interests**

31       Although the State's Department of the Attorney General has itself  
32 rejected the other alleged compelling State interests, the Commission has  
33 examined them. The Commission **agrees with the First Deputy**  
34 **Attorney General in finding** that none of them are compelling.



1 The Commission **also** finds that these other ten defenses were all  
2 part of the public, academic, and legal debate that culminated in the **Loving**  
3 case, and that all these arguments were rejected by the U.S. Supreme  
4 Court.

## 5 Defense #1 : Religion

### 6 **The First Argument**

7 **The first religious argument has been that nearly all of our**  
8 **people posses fundamental religious beliefs, that all religions believe**  
9 **in God, that the Bible is the literal word of God, and that the Bible**  
10 **says not to allow same-gender marriages, so therefore there is a**  
11 **compelling State interest against same-gender marriages.<sup>24</sup>**

12 **The Commission finds that it may well be true that nearly all of**  
13 **our people possess fundamental religious beliefs, though this is**  
14 **subject to interpretation, the conclusion is itself inconclusive, and in**  
15 **any event some of our people do not. More importantly, the**  
16 **Commission finds that all religions do not believe in God.<sup>25</sup>**

17 **Specifically, the Commission finds that Buddhism is the second**  
18 **largest religion in the state. Some of its denominations dwarf the**  
19 **size of the large numbers of Christian denominations here. As world**  
20 **religion it is often considered only to Christianity. And yet it does**  
21 **not believe in God. The Commission also finds that traditional**  
22 **Hawaiian religion, protected under our Constitution and laws cited**  
23 **above, has its belief in the major Gods and the innumerable other**  
24 **Gods. Many other of the world's religions did not or do not believe**  
25 **in a single God.<sup>26</sup>**

26 **The Commission also finds that the argument that the Bible is**  
27 **the literal word of God also does not withstand scrutiny. Buddhists,**  
28 **Muslims, adherents to traditional Hawaiian religion, and others do not**  
29 **subscribe to this belief.<sup>27</sup>**

30 **And while it is true that Judaism and most Protestant Christian**  
31 **denominations follow the same Jewish bible (called the "old**  
32 **Testament" by many Christians), the Commission finds that is also**  
33 **true that the Catholic, Greek Orthodox, and Russian Orthodox**  
34 **divisions of Christianity each follow different Jewish bibles. And even**  
35 **within the Jewish and Protestant pair there is a major division: only**  
36 **the latter follows the "New Testament." and even within the various**  
37 **denominations or branches of Judaism, Catholicism, Protestantism, the**  
38 **Greek Orthodox, and the Slavic Christian Religions, there are a wide**

1 variety of opinions concerning the literalness of the various Bibles  
2 that they have chosen to follow.<sup>28</sup>

3 The Commission also finds that whether these various Bibles  
4 condemn same-gender relationships is open to differences in  
5 interpretation. The results of study on the topic are inconclusive,  
6 although the preponderance of current scholarly opinion is that the  
7 various Bibles do not condemn such relationships other than to  
8 condemn exploitive relations whether they are same- or different-  
9 gender.<sup>29</sup>

## 10 The Second Argument

11 The Commission finds that a second argument concerning  
12 religion is that certain religious groups within our community fell  
13 extremely strongly that same-gender relationships are anathema to  
14 their religious beliefs and practices and that therefore other religious  
15 groups should not be allowed to marry same-gender couples and that  
16 such relationships should not be allowed.<sup>30</sup>

17 The Commission finds that this argument was well stated and  
18 laid out in a recent Federal lawsuit,<sup>31</sup> which sought to nullify a State  
19 law expressly protects the rights of religious groups to marry same-  
20 gender couples if they want to.<sup>32</sup> The Federal court's decision was  
21 that the religious argument to prohibit one religion's beliefs and  
22 practices so as to allow another's, all in the name of the freedom to  
23 practice religion was "baffling." The attempt to nullify the State law  
24 was unsuccessful and the State law was upheld as Constitutional  
25 under the U.S. Constitution. This decision was not appealed and so it  
26 stands for the District of Hawaii.<sup>33</sup>

## 27 The Third Argument

28 The Commission finds a third argument dealing with the mottos.  
29 The Federal government's motto of "In God We Trust" has been cited  
30 as a reason to respect some religious group's beliefs that same-  
31 gender relationships should not be allowed. The Commission notes,  
32 however, that this motto does not carry religious connotations but  
33 instead has a secular (non-religious) meaning. Otherwise, it would be  
34 challenged on First Amendment grounds.<sup>34</sup>

35 The Commission has also heard that the State's motto, "Ua Mau  
36 Ke Ika, I Ka Aina I Ka Pono," when translated at times into English,  
37 includes the word "righteousness," and under some religious  
38 interpretations this has been suggested as opposing same gender  
39 relations.<sup>35</sup>

1           **But the Commission finds that the Hawaiian term being**  
2 **translated, "pono" can carry different meanings than the Hebrew and**  
3 **Greek terms translated as "righteousness" in the Jewish bible or in**  
4 **the "New Testament." The Commission also notes that the State**  
5 **motto, when first coined, was not addressed to same-gender relations,**  
6 **but rather towards the wrong act of Great Britain attempting to**  
7 **establish a protectorate over the Hawaiian Islands in 1842 so as to**  
8 **affect, amongst other things, the land-tenure policies of the Hawaiian**  
9 **Kingdom. Finally, the Commission notes that the author of the State's**  
10 **motto, Kamehameha III, was not opposed to same-**  
11 **gender relationships, having had many himself.<sup>36</sup>**

## 12           **The Fourth Argument**

13           **There has been the allegation, the Commission finds, that by**  
14 **allowing the certification of same-gender marriages, the State would**  
15 **begin to force churches to marry same-gender couples, even if this**  
16 **was against their religious beliefs and practices. The Commission**  
17 **finds that this allegation is without merits because § 572-12, HRS does**  
18 **not require a minister, priest or officer of any religious denomination or**  
19 **society to solemnize a marriage that is not in accordance with the usage,**  
20 **rules and customs of that denomination or society. Nor does § 572-12,**  
21 **HRS require any minister, priest, or officer of any religious denomination**  
22 **or society to perform any marriage.<sup>37</sup>**

## 23           Defense #2 : Definitions

24           **The Commission finds that dictionary definitions (e.g. Webster's) are**  
25 **not legal definitions. There is no definition unless the court makes such a**  
26 **definition. Refer to *Loving*.<sup>38</sup>**

27           **The Commission also finds that the matter of definition was**  
28 **directly addressed and resolved by the Hawaii Supreme Court in the**  
29 ***Baehr* decision.<sup>39</sup>**

## 30           Defense #3 : Morality

31           **The Commission finds that the common morality argument that**  
32 **has been presented is to forbid same-gender marriage on the**  
33 **grounds that they are immoral, and secondly, to deny such marriages**  
34 **a certificate from the government.<sup>40</sup>**

35           **But the Commission finds that same-gender marriages are**  
36 **already allowed and protected under State law. Furthermore, that**

1 such law was passed by the Hawaii legislature, signed into law by  
2 the Hawaii executive, and that it has been ruled constitutional under  
3 the U.S. Constitution by the Federal judiciary, and is presumptively  
4 constitutional under the Hawaii Constitution.<sup>41</sup>

5 The Commission concludes that having a religious practice  
6 protected by law, passed by the legislature, signed into law by the  
7 executive and passed on by a judiciary does not equate to its  
8 morality or immorality. But the presumption is that the religious  
9 practice being protected, in this case the celebration of the sacrament  
10 of same-gender marriage by religious groups, must be considered  
11 legal and moral. While other religious groups are free to view such  
12 religious practice as immoral, this is a matter of their belief. They  
13 are free to argue in the public arena for a repeal of such a law, or for  
14 a suspension of those religious groups that practice same-gender  
15 marriage, but this Commission has found no compelling reason to call  
16 for such an appeal or for such suppression. Indeed, this Commission  
17 finds in favor with the Federal judiciary's ruling on the law, which  
18 noted that it appeared a fair way to support an even-handed  
19 treatment religion without causing harm to religion.<sup>42</sup>

20 The Commission having found that the religious belief and  
21 practice of celebrating the sacrament of same-gender marriage being  
22 protected in this State, the remaining immorality argument to  
23 consider is whether it is immoral to grant certification of such  
24 marriages.

25 The Commission has found no compelling arguments that to  
26 certify such marriages to be immoral. Instead, the Commission has  
27 already found that to deny such couples, and their religious  
28 denominations or societies, the option of securing a certificate is itself  
29 contrary to public policy and hence immoral.<sup>43</sup>

### 30 Defense #4 : Public Health and Safety

31 Same-gender marriages (and the children from such marriages)  
32 already exist in Hawaii. There has been no adverse public health and  
33 safety effect from these marriages.

34 National findings from experts and professional associations have  
35 found no adverse public health effect from these marriages and families.<sup>44</sup>  
36 **Indeed, the Commission finds that it is in the public interest to**  
37 **promote the public health and safety by encouraging the formation**  
38 **of committed families, and that the offering of marriage certification**  
39 **to all couples is in the public interest.**

## Defense #7 : Public Opinion

The Commission finds that public opinion is important in forming public policy, but that is not a conclusive factor when dealing with constitutional issues. The *Loving* case, in particular, is a good historical example of this, as is the earlier *Brown v. Board of Education* case.

With *Loving*, the Commission finds that polls at the time indicated that 80% or more of the American people were opposed to ending racial discrimination in marriage, and 40% of the whole country felt that the decision was wrong and laws should exist in every State in favor of racial discrimination. It is thought that these figures were higher in Virginia.<sup>45</sup>

Still the Commission finds that Virginia survived, as did the country as a whole. Today the statistics nationally are about half the figures of 28 years ago, but that still means that one in five Americans feel racial barriers should be again imposed by law, and two of five Americans feel that interracial marriage is wrong.<sup>46</sup>

With *Brown v. Board of Education* (1954), the Commission finds that polls showed overwhelming opposition to integrating the nation's schools. Billboards to "lynch" the Supreme Court's Chief Justice went up around the country and stayed up for decades to come. Opposition bordering on insurrection was common, for years afterwards, with governors calling up their States' militia (i.e., the National Guard) and positioning armed troops to prevent children of the "wrong" race from going to school. The Federal army had to be called in, with some doubting if it would follow its commanders' orders. And the Commission finds that opposition to school integration remains strong in the country to this day.<sup>47</sup>

Yet the Commission also finds that no rational argument exists today claim either *Brown* or *Loving* were the wrong thing to do. There is instead, the Commission finds, complete evidence that both decisions were correct and if anything, wrong only in the length of time it had taken the U.S. Supreme Court to have acted in these two areas of racial discrimination.

With regard to public opinion and the *Baehr* case, the Commission finds that today about one-third of the State openly supports ending the gender discrimination in marriage - a much higher rate of support for equality that existed in the country for ending school race discrimination before *Brown*, or in Virginia for ending marriage race discrimination before *Loving*. The Commission

1 also finds that about two-thirds of Hawaii's citizens support equal  
2 rights for persons desiring same-gender relations, a rate of support  
3 far in excess of those supporting racial equality in education in the  
4 country 41 years ago, or those supporting racial equality in marriage  
5 in Virginia 28 years ago.<sup>48</sup>

6 The Commission concludes that public opinion is an important  
7 factor, but that it is not a conclusive reason to continue the current  
8 discrimination with marriage. The Commission fully expects reviews  
9 in the future to look back at the decision to certify same-gender  
10 marriages in Hawaii - if indeed such a decision is made - with much  
11 the same conclusions that this Commission has reached above with  
12 regard to looking back at the decisions to end race discrimination in  
13 the school and in marriages.

#### 14 Defense #8 : Public Order

15 The Commission finds that one can easily point out that society  
16 was not unduly put at risk as an outcome of the *Loving* decision, or for  
17 that matter, the *Brown* decision. Instead, the nation has improved  
18 over time because of both decisions.

19 The Commission also finds that certifiable marriage is an  
20 intrinsically stable and stabilizing arrangement between two people. As  
21 such, public order should be enhanced if same-gender marriages  
22 were given the option of becoming certified

23 The Commission also finds that public order could not be put at risk  
24 since no marriages could be thrust upon the unwilling. This is in contrast  
25 to earlier civil rights legislation which required forced desegregation or  
26 affirmative action.

#### 27 Defense #9 : Equality

28 The Commission finds that this was directly addressed and rejected  
29 by both the *Loving* and the *Baehr* courts.<sup>49</sup>

#### 30 Defense #10 : Individual Rights

31 The Commission finds that this argument was most persuasively  
32 made prior to the Civil Rights Act of 1964, a legislative action taken  
33 in the context of the judicial decisions of *Brown* and *Loving*. Yet an  
34 examination of history shows that the South did not witness a

1 **meltdown of individual rights after passage of the Act.** Nor did the  
2 Act put individuals at risk of losing any of their civil rights, black or white.

3 **The Commission finds that inconveniences did occur.** Employers  
4 sometimes had to keep on the payroll workers they disagreed with  
5 over race. Parents sometimes found their children's teachers to be of  
6 the "wrong" race, and churches experienced pressure to integrate.  
7 Restaurant and hotel owners had to allow people to use their facilities  
8 regardless of race.

9 **But the Commission finds that none of these inconveniences**  
10 **placed people's individual rights at risk.** And, looking back, we can  
11 **see how our rights as whole were enhanced by moving our nation**  
12 **towards better quality.** Who would say today that an employer,  
13 **parent, restaurant owner, or hotel proprietor, should be able to fire**  
14 **someone, replace a teacher, or refuse service, based solely on race?**  
15 **What "individual right" is enhanced by allowing unconstitutional**  
16 **discrimination to persist?**

17 **The Commission concludes that this lesson from history is**  
18 **applicable to Hawaii today as the State wrestles with the question of**  
19 **allowing unconstitutional discrimination to persist with regard to**  
20 **same-gender marriage certification.**

## 21 ***Defense #11 : Special Rights***

22 **The Commission finds that the concept of "special rights" used**  
23 **as an argument against civil rights decisions or legislation, traces**  
24 **back to the anti-integration era of over 30 years ago, when the**  
25 **argument was used against racial integration.<sup>50</sup>**

26 **The Commission finds the term "special rights" is somewhat**  
27 **vague.** One meaning is that the decision or legislation being  
28 **protested against will somehow grant some kind of unique or special**  
29 **benefit to someone.** While some people then (and now) would like to  
30 **think this first definition somehow applies, it is actually pretty clear**  
31 **that this definition did not apply to African-Americans 30 years ago**  
32 **and it does not apply to those seeking certification of their same-**  
33 **gender marriages today.** In both cases, the benefits being requested  
34 **were (or are) already available to other, and no unique or special**  
35 **benefit is being contemplated.**

36 **The Commission also finds that the term also can mean that any**  
37 **civil right - such as the right to sit at a lunch counter, or sit in an**  
38 **empty seat in the front of a public bus - is "special."** For example,  
39 **the century-old civil Rights Act of 1866, commonly used over the past**

1 three decades in discrimination lawsuits, guaranteed to all persons  
2 "the same right...to make and enforce contracts...as is enjoyed by  
3 white citizens."<sup>51</sup>

4 The Commission finds that in this example it is clear that rights  
5 are being granted to non-whites. This could be viewed somehow as  
6 "special." But the Commission finds that this law was designed to  
7 create a level playing field, to extend to non-whites some  
8 fundamental rights already available to whites.<sup>52</sup>

9 As another example, the Commission finds that one time only  
10 whites were allowed to vote in many southern primary elections  
11 because the political parties were allowed to exclude blacks from the  
12 parties primaries. When the Federal government considered forcing  
13 the parties to allow non-whites to vote, this was objected to as  
14 granting non-whites a "special right." Yet without the right to vote,  
15 the Commission finds, how could non-whites participate in this most  
16 fundamental of civil rights?<sup>53</sup>

17 The Commission also finds that we have long since agreed that  
18 being able to eat in a restaurant, or stay a night in a hotel, are  
19 fundamental to our civil rights - yet these rights were vigorously  
20 fought against as "special rights" prior to passage of the Civil Rights  
21 Act of 1964.<sup>54</sup>

22 The Commission concludes that just as having a meal or finding  
23 a bed to spend the night are fundamental rights to living in our  
24 nation, so are the basics of marriage certification. Indeed, the  
25 Commission concludes that the fundamentals of certified marriage are  
26 even more basic to our well-being as citizens, and to deny these  
27 rights even more pernicious than the earlier denials of room or board.

28 The Commission additionally finds that the "special rights"  
29 argument since the anti-integration debates of 30 years ago, has  
30 included a concept that human rights are some kind of "zero-sum  
31 game" where granting a human right to one person somehow takes  
32 it away from someone else. This was argued strenuously in the  
33 debate over the Civil Rights Act of 1964, when the case was made  
34 that allowing someone to sit at a lunch counter somehow took away  
35 some right from the restaurant's owner.<sup>55</sup>

36 The Commission finds that this argument was incorrect thirty  
37 years ago, and it is incorrect today. Denying fundamental human  
38 rights is never correct. Granting a fundamental human right to  
39 someone never takes away anything of value from someone else. In  
40 short, there are more to fundamental rights than a "zero-sum game."



1 **The restaurant proprietor is inconvenienced perhaps, for a time but**  
 2 **the country improves in the long run.**

3 **The Commission points to the American south today. It was an**  
 4 **economic backwater 30 years ago. What self-respecting company**  
 5 **would engage in major business in a part of the country that treated**  
 6 **citizens like dogs? But today the area has been remade. It is a**  
 7 **modern economic center, engaged in world-class events. Even the**  
 8 **segregationist restaurant owner has prospered and lived to see the**  
 9 **error of his or her ways.<sup>56</sup>**

10 **The Commission finds that the same lesson of history applies to**  
 11 **granting the fundamental right of marriage certification to married**  
 12 **same-gender couples. Some others may be inconvenienced, but no**  
 13 **one will "lose rights" because of this. And the State will gain by**  
 14 **expanding basic human rights to her citizens. Extending fundamental**  
 15 **human rights does not subtract from others nor harm them.**

16 **Indeed, the Commission further finds that the "special rights"**  
 17 **argument that has so often been used against granting fundamental**  
 18 **human rights could be said to be but a thinly veiled attempt to cover up**  
 19 **the fact that the inequities suffered by African-Americans or same-gender**  
 20 **couples today are so great that any claim to equal and fair treatment**  
 21 **under the law would somehow seem "special."**

## 22 **Defense #12 : Economic Hardship**

23 **The Commission has received** convincing testimony from leading  
 24 economists that there should be no hardship to the State's economy  
 25 because of extending certificates to **same-gender** families. Indeed, it  
 26 appears that the economy will be helped by extending such benefits to  
 27 same-gender marriages.

28 **The Commission therefore finds that helping the economy is in the**  
 29 **public interest. The Commission further finds that it is in the public**  
 30 **interest to extend equal rights to these families because the economy will**  
 31 **be helped. Also, the Commission finds that by continuing to deny equal**  
 32 **rights, the State is conversely harming the economy and therefore hurting**  
 33 **the public interest.**

34

 **Narrowly Drawn** 

1           When a law discriminates against persons on a basis of religion,  
2 race, gender, etc., it is "presumed to be unconstitutional unless the state  
3 shows compelling state interests."<sup>57</sup> In addition, the State must show that  
4 the law is "narrowly drawn to avoid unnecessary abridgments of constitu-  
5 tional rights."<sup>58</sup>

6           As the Commission's examination has shown the State's alleged  
7 compelling state interests in this matter to not be compelling, it is  
8 unnecessary to show if the discriminatory law was narrowly drawn.  
9 However, for the record, the Commission finds that even if one or more of  
10 the State's alleged compelling public interests were found to be  
11 compelling, the law would still be unconstitutional as it is not narrowly  
12 drawn so as to avoid unnecessary abridgments of constitutional rights.

## 13           **Public Policy Reasons to Extend Benefits to Same-** 14           **gender Couples.**

### 15           **Policy Reason No. 1**

16           **Article I, sections 2, 3, and 5 of the Constitution of the State of**  
17 **Hawaii makes it clear that all persons in Hawaii are entitled to equal**  
18 **protection of the law, the right to enjoy their inherit and in alienable**  
19 **rights to life, liberty and the pursuit of happiness, and be free from**  
20 **discrimination or the denial of these basic rights on the basis of sex.**

21           **The Commission finds that the denial of benefits of marriage to**  
22 **same-sex couples purely on the basis of their gender is a violation of**  
23 **these basic constitutional rights.**

### 24           **Policy Reason No. 2**

25           **The Supreme Court of Hawaii in the case which gave rise to the**  
26 **establishment of this Commission (*Baehr v. Lewin*, 74 Haw. 530),**  
27 **recognized the relevance of the United States Supreme Court 1967**  
28 **decision to strike down a Virginia statute which prohibited**  
29 **miscegenation or interracial marriage (*Loving v. Virginia*, 388 U.S. 1).**  
30 **The Hawaii Supreme Court has found that denial of same-sex**  
31 **marriage was presumed to be a violation of equal protection of the**  
32 **law unless the State could show a "compelling state interest" for such**

1 denial. The Commission finds that the various reasons advanced for  
2 denying same-sex marriages - including religious, moral and public  
3 health and safety - are similar to the *Loving* case and do not  
4 constitute a "compelling state interest" and as a matter of public  
5 policy should not be used to deny equal rights under the law to  
6 same-sex couples.

### 7 Policy Reason No. 3

8 The argument that same-sex marriage should be barred because it  
9 cannot lead to procreation is invalid, inconsistent, and discriminatory.  
10 State law does not require that opposite-sex couples prove that they  
11 are capable of procreation before they can be married, and many  
12 obviously are not, because of age, medical or other reasons.  
13 Individuals in a same sex marriage may have children from a prior  
14 opposite-sex marriage, or can adopt children if they desire a family.

15 Public policy should not deny same-sex couples the right to  
16 marriage, and the right to raise a family if they wish to do so, on the  
17 excuse that they, between themselves, cannot procreate, when this  
18 reason is not applied to opposite-sex couples.

### 19 Policy Reason No. 4

20 The fact that some religions or branches thereof, and many  
21 churches condemn and strongly oppose same-sex marriage does not  
22 mean, under our constitutional government, that those religious  
23 beliefs can be imposed on others who do not hold them. Our  
24 separation of church and state prevents this type of religious  
25 enforcement through state institutions, such as the Department of  
26 Health.

27 Public policy should prevent the imposition of a particular  
28 religious doctrine on those who do not subscribe to it, and therefore  
29 should not be used to prohibit, by law, same-gender marriages.



## Conclusion

1

2

3       The Commission finds that substantial public policy  
4 reasons exist to extend all the legal and economic benefits  
5 discussed in Part I of this report to same-gender couples  
6 willing to enter into the marriage contract, with all the  
7 responsibilities and burdens which that contract entails.

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



## End Notes.

- 1 Portion of Amendment 14, section 1, of the U.S. Constitution.
- 2 Portion of Amendment 14, section 1, of the U.S. Constitution.
- 3 Cite Loving.
- 4 Give citation.
- 5 Portion of Article I, section 5 of the Hawaii Constitution.
- 6 Article I, section 3, Hawaii Constitution.
- 7 Cite Bachr.
- 8 I.e., Chapter 572, HRS.
- 9 On the one hand, a majority is against "gay marriage." On the other hand, a majority are in favor of equal rights for same-gender couples. Poll results, at least in the present case for Hawaii citizens, seem to depend on how the polling question is phrased.
- 10 This restatement is based on the Hawaii system of addressing fundamental human rights. When such rights are threatened, the burden of proof is always on the discriminator to justify the discrimination.  
  
While this system of using "compelling State interests" is a legal one, it makes sense from a lay person's point of view: we love liberty, we love equality, and we are fundamentally opposed to discrimination and so we impose the burden on the discriminator to justify the discrimination that is taking place.
- 11 Southern California law Review, Vol. 68, Maryland Law Review Vol. 53 and material submitted by la Croix, Mak and Ghali.

- 
- 12 Cite his testimony
- 13 He also described a supplemental civil rights defense, associated with the procreation/children defenses, and described later in the text.
- 14 Give report page citations.
- 15 Give page number citations.
- 16 Give citations, etc. Can include modern articles that have directly applied the past to the current situation if Hawaii does certify same-gender marriages.
- 17 Cite his testimony.
- 18 Cite his testimony.
- 19 Article I, 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."
- 20 Give citations.
- 21 Cite his testimony.
- 22 Give citations on this.
- 23 The Commission notes that Section 1 of Act 217, Session Laws of Hawaii 1994, "Legislative findings and purpose," spells out certain Legislative findings on the Baehr case.

Many of these findings are beyond the scope of this Commission. However, on pages 529 and 530 of Session Laws, the following Legislative findings occur:

---

The legislature further finds that section 572-1, Hawaii Revised Statutes, and all of Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages.

The legislature finds that Hawaii's marriage licensing statutes, both as originally enacted and at present, are intended to apply only to male- female couples, not same-sex couples. The Commission, in its analysis of the history, has come to the same conclusions, as cited in the text.

The Legislature, on page 530 of Session Laws, also concluded "that same-sex relationships do exist." As such, the Commission was established (as reorganized since then by Act 5, Session Laws of Hawaii 1995) to conduct its study. The results of that study is given here.

- 24 Give citation
- 25 Give citation
- 26 Give citation
- 27 Give citation
- 28 Give citation
- 29 Give citation
- 30 Give citation
- 31 Give citation
- 32 Give citation
- 33 Give citation
- 34 Give citation
- 35 Give citation

---

36 Give citation

37 HRS § 572-12 reads:

*"A license to solemnize marriages may be issues to, and the marriage rite may be performed and solemnized by any minister, priest, or officer of any religious denomination or society who has been ordained or is authorized to solemnize marriages according to the usage of such denomination or society, or any religious society having a clergy but providing solemnization in accordance with rules and customs of that society or any justice or judge or magistrate, active or retired of a state or federal court in the State upon presentation to such person or society of a license to marriage, prescribed by this chapter." (Emphasis added.)*

38 Cite definitions per Loving .

39 Give citation

40 Give citation

41 Give citation

42 Give citation

43 Give citation

44 Give citation

45 Give citation

46 Give citation

47 Give citation

48 Give citation

49 Give citations.

50 Give citation



- 
- 51 Give citation
- 52 Give citation
- 53 Give citation
- 54 Give citation
- 55 Give citation
- 56 Give citation
- 57 Baehr v. Lewin, 74 Haw 535 (1993).
- 58 Baehr v. Lewin, 74 Haw 535 (1993).

# TESTIMONIAL STATEMENT

TO: COMMISSION ON SEXUAL ORIENTATION AND THE LAW

FROM: BRUCE FERNANDES PO Box 714 PAIA, HI 96776

I disagree with the Sommer Le Croix testimony in favor of same sex marriages based upon the fact that 172,000 gay tourist will come to Hawaii per year to get married.

What a stupid and desperate argument! Just because we can not manage our taxes does not mean that we have to open up pandora's box and legalize gay marriages.

Besides do we really want 172,000 gay people per year coming to Hawaii promoting their concept of family? How many of these people will move here, PAY LESS IN TAXES and yet take advantage of our social and medical laws, lobby the government for more benefits and rights, and use our crowded nursing homes and hospitals if they develop AIDS?

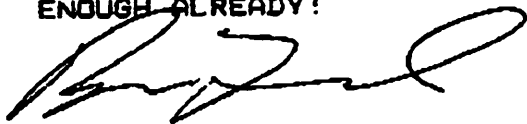
Don't you think that Hawaii's liberal social and health programs will be abused? What would be the long term effects to our children, our hospitals, our family life, our education system, our tax structure, our society in general? What about the potential for fraud? What about gay divorces tying up our overcrowded courts?

Gays want the tax benefits, the pension benefits, the insurance benefits.... What are they willing to give back? Less taxes and more lawsuits? I think NOT! Is this a conspiracy? Is it discrimination? Is it unequal? Is it unfair? NO!!!

Marriage benefits are designed to strengthen and protect children and families from sickness, disability and death. Producing children is an essential part of marriage and that is the reason we have these benefits.

I do not have a problem if a gay person chooses to get married and commits themselves to each other in a loving spiritual bond. I do have a problem with gays forcing the majority to commit money and resources to enhance their lifestyle.

The bottom line is money. Marriage does provide economic and tax benefits to help promote and strengthen family life. Opening up these benefits to gay couples is unfair and discriminatory towards families and the majority. Please ENOUGH ALREADY!



767 Kupulau Dr.  
Kihei HI 96753  
October 16, 1995

Committee on Sexual Orientation  
and the Law

c/o Legislative Reference Bureau  
State Capitol 4th Fl.  
Honolulu, HI 96813.

Dear Sir:

I will never accept marriage or  
legal domestic partnerships for homo-  
sexuals. I urge you to oppose  
legal benefits for these groups.

Polls state two thirds of our State  
oppose benefits for these groups. This  
is democracy and we as Citizens  
expect your Commission to uphold  
our views. Morality is important  
and many laws uphold morality  
(such as murder).

No legal benefits for homosexuals.

Sincerely yours,  
Sandra Pelosi



Sandra Pelosi  
767 Kupulau Dr.  
Kihei, HI. 96753-9349



# **University of Hawai'i at Mānoa**

**The William S. Richardson School of Law**  
2515 Dole Street • Honolulu, Hawai'i 96822

## **Testimony of**

**Professor Jon M. Van Dyke**  
**William S. Richardson School of Law**  
**October 25, 1995**

**before the**

**Commission on Sexual Orientation  
and the Law**

**BAEHR V. LEWIN, 74 Haw. 530, 852 P.2d 44 (1993)**

**HOLDINGS:**

**\*\* Sex is a "suspect category" under Article I, Section 5 of the Hawaii Constitution.**

**\*\* HRS 572-1 (restricting the marital relation to opposite-sex couples) "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex," and thus "establishes a sex-based classification." (64)**

**\*\* This statute is therefore "presumed to be unconstitutional" unless the state can show that**

**\*\* "(a) the statute's sex-based classification is justified by compelling state interests and**

**\*\* "(b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights." (67)**

**\*\* The state's argument that "marriage" is innately a relationship between a man and a woman is rejected as "circular and unpersuasive" (61), "tautological and circular" (63), and "tortured and conclusory sophistry." (63)**

**ACT 217 (June 22, 1994)**

**\*\* "The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary."**

**\*\* "The Hawaii supreme court's recent plurality opinion in Baehr v. Lewin...effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government."**

**\*\* "The Hawaii state legislature, as the elected representatives of the people of the State of Hawaii, is, along with the executive branch, the appropriate source of major policy initiatives. The Hawaii supreme court in Baehr has in effect substituted its own judgment for the will of the people of this State."**

**ACT 217 (June 22, 1994)**

**\*\* "[T]he Hawaii supreme court in Baehr has interpreted Article I, section 5 in a manner not intended by the framers of Hawaii's Constitution, by analyzing the equal protection issue presented in that case in terms of sexual orientation or preference classification in place of gender classifications."**

**\*\* "The legislature further finds that section 572-1...[was] intended to foster and protect the propagation of the human race through male-female marriages."**

**\*\* Legislature recognizes that "same-sex relationships do exist" and**

**\*\* "Provides assurances consistent with Article I, section 4, of the Hawaii Constitution that the laws of the State do not prohibit religious organizations from solemnizing same-sex relationships;" and**

**\*\* Establishes seven-member commission on sexual orientation.**

## **THE STRICT SCRUTINY TEST**

The burden is on the government to demonstrate:

(1) that it has a compelling state interest  
AND

(2) that the means chosen to achieve that goal is "narrowly drawn" or is "necessary." Another way the government can meet this second element is to establish that it is using the least drastic alternative to achieve its goal.

When this high level of scrutiny is being utilized, the court will also examine whether the state is consistent and evenhanded in applying its rationale.



## **COMPELLING STATE INTEREST**

**In 1993, the state provided a list of the "compelling" interests it believed justified HRS Section 572-1:**

**\*\* "[a] compelling state interest in fostering procreation," because same-sex couples cannot, as between them, conceive children" and "a child is best parented by its biological parents."**

**\*\* "same-sex couples will have disproportionate incentives to move and/or remain in Hawaii" costing the state money and distort[ing] the job and housing markets: and "alter[ing] the State of Hawaii's desirability as a visitor destination"**

**\*\* "allowing same-sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors"**

**Examples of situations where the US or Hawaii Supreme Court has found "compelling state interests":**

**United States v. Paradise, 480 U.S. 149 (1987)-- "pervasive, systematic, and obstinate discriminatory conduct" in the hiring and promotion practices of the Alabama State Troopers justified a narrowly tailored race-based affirmative action program.**

**Lee v. Washington, 390 U.S. 333 (1968)--racial tensions in prison justified temporary racial segregation of prisoners.**

**Regents of the University of California v. Bakke, 438 U.S. 265 (1978)--the goal of racial diversity in the classroom was deemed to be a "compelling state interest" that would justify preferences based on race, but the specific program at issue in that case was struck down because it established a rigid quota and thus was not the "least drastic alternative" that could have been used to promote diversity; the Court indicated that giving minority students a "plus" with regard to admissions would be "less drastic" and therefore permissible.**

**Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978)--"the maintenance of security in the prison is sufficient...to establish...a compelling state interest" to justify requirement that female visitors to the prison wear undergarments. Requiring prison to individually determine whether lack of undergarments on individual female visitors "would be regarded as sexually provocative by male residents of the prison...[would create] such intolerable difficulties in making subjective decisions at the prison door as to exclude its use as a less burdensome alternative."**

## **CONSISTENTLY APPLIED?**

**To meet the Strict Scrutiny Test, legislation must be consistent in its application to the goals identified by the legislature.**

**In 1984, Hawaii's Legislature deleted the requirement that marriage applicants show that they are not impotent or not physically incapable of entering into a marriage.**

**"The intent of this amendment was to remove any impediment that may have prevented persons who were physically handicapped or elderly, or who had temporary physical limitations, from entering into a valid marriage." (from Act 217)**

## **LEAST DRASTIC ALTERNATIVE?**

**Burden is on the government to demonstrate that it has chosen the least drastic, least onerous, and least burdensome method of achieving its goal.**

**If any other method can be identified to achieve the government's goal, then the method at issue will not be deemed to be "necessary" and "narrowly tailored" to the achievement of that goal.**

## "Substantial Public Policy Reasons"

- \*\* Fundamental Concepts of Fairness, Equality, Openness, and Toleration**
- \*\* Respect for the Autonomy and Privacy Individual**  
*of the*
- \*\* Respect for History and Tradition, and for Religious and Ideological Diversity**
- \*\* Governmental Neutrality**

## **THE DOMESTIC PARTNERSHIP OPTION**

**Grant same-sex couples all the benefits (and burdens) now given to "married couples," but establish a different category--called "domestic partnership," or something similar.**

### **Advantages:**

**\*\* Would probably render the current litigation "moot," because the same-sex couples would no longer suffer any tangible "injury" and hence would not have "standing" to pursue the case.**

**\*\* Would provide benefits and a sense of legitimacy to the same-sex couples and thus would be consistent with the state's commitment to fairness and tolerance.**

**\*\* Would respect the views held by some that "marriage" is a special and sacred relationship that should be reserved to opposite-sex couples.**

## Full Faith and Credit Clause

**U.S. Constitution, Article IV, Section 1:  
"Full Faith and Credit shall be given in each  
State to the public Acts, Records, and  
judicial Proceedings of every other State."**

- \*\* Ordinarily requires states to enforce  
court judgments from to other states.**
- \*\* Exceptions exist when fundamental  
public policy concerns are violated by  
the other state's decision.**
- \*\* "no state . . . can enact laws to  
operate beyond its own dominions."  
Dred Scott v. Sandford (1857)**

**WOULD A RESIDENCY REQUIREMENT  
BE LEGITIMATE?**

**Yes.**

**Sosna v. Iowa, 419 U.S. 393 (1975), allowed Iowa to maintain a one-year residency requirement for persons seeking a divorce.**

**Even though this requirement imposed a burden on the right to travel, the Court accepted the legitimacy of Iowa's stated interest in avoiding becoming "a divorce mill for unhappy spouses" and in having its divorce decrees accepted by other states under the Full Faith and Credit Clause of the U.S. Constitution, Article IV, Section 1.**



**MEMORANDUM**

TO: Chairman Thomas P. Gill, Commission on Sexual Orientation and the Law

FROM: Frederick W. Rohlfing III

DATE: Wednesday, October 25, 1995

RE: Appropriate Recommendations to the Legislature

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As you know, I am an attorney in private practice. I was a member of the Commission on Sexual Orientation created by Act 217 of the 1994 Hawaii Session Laws, which has been superseded by the present Commission created by Act 5 of the 1995 Hawaii Session Laws. I am submitting this testimony in response to your invitation to brief the Commission as to the positive and negative aspects of different types of legislation that the Commission could present to the legislature.

**I. Background**

In order to effectively evaluate possible recommendations to the legislature, it is critical to analyze the judicial decision that set in motion the events leading up to the creation of this Commission and the tasks assigned to it. That decision, of course, is Baehr v. Lewin, 74 Hawaii 530, 852 P.2d 44 (1993).

**A. Baehr v. Lewin overview**

In Baehr v. Lewin, the Hawaii Supreme Court vacated a Circuit Court judgment dismissing homosexual marriage claims, and ruled that Hawaii's marriage law allowing only heterosexual couples and not homosexual couples to obtain a marriage license constitutes sex discrimination under the State Constitution's equal protection and equal rights provisions.

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The case began in 1991 when three same-sex couples who had been denied marriage licenses by the State Department of Health (“DOH”) brought suit in state court against the DOH Director. Hawaii law requires couples wishing to marry to obtain a marriage license (common law marriage is not authorized). H.R.S. § 572-1 (1985). While the marriage license law did not explicitly prohibit homosexual marriage at the time, it used terms of gender in such a way as to make clear that only heterosexual couples could marry. The plaintiffs sought a judicial declaration that the Hawaii marriage license law is unconstitutional insofar as it prohibits homosexual marriage, and an injunction prohibiting state officials from denying marriage licenses to homosexual couples on account of the heterosexuality requirement.

The Hawaii Supreme Court vacated the Circuit Court judgment, in part, and remanded the case for trial, finding unresolved factual questions. Justice Levinson’s opinion was joined in by Chief Justice Moon.

In the first part of his opinion, Justice Levinson analyzed the argument of the homosexual couples that the limitation of marriage to heterosexual couples violated the constitutional right of privacy. Justice Levinson noted: “In this connection, the United States Supreme Court has declared that ‘the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.’” 74 Hawaii at 552, 852 P.2d at 55, quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

Justice Levinson’s correct resolution of this issue is often overlooked. He rightly held that there was no “fundamental constitutional right to same-sex marriage” because such a relationship is not “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.” 74 Hawaii at 557, 852 P.2d at 57. It is ironic that while Justice Levinson relies almost wholly on the holding of the United State Supreme Court in Loving v. Virginia, 388 U.S. 1 (1967) to support his equal protection analysis, he nevertheless found no fundamental constitutional right to same-sex marriage, where the Court in Loving by contrast held that the prohibition on inter-racial marriage deprived an interracial couple “of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.” Id. at 12.

It is only after concluding that there is no fundamental constitutional rights to same-sex marriage that Justice Levinson gets off the track. Having determined that there was no fundamental constitutional right to same-sex marriage, he then proceeded to examine whether homosexual couples seeking marriage licenses were denied the equal protection and equal rights guarantees of the Hawaii Constitution. Woodenly analogizing from the equal protection inquiry of Loving v. Virginia, Levinson declared that Hawaii’s marriage license law facially “discriminates based on sex against the applicant couples,” thereby presenting an apparent violation of the state constitution provisions protecting equality. 74 Hawaii at 557-583, 852 P.2d at 57-62. After suggesting that none of the prior cases rejecting homosexual marriage claims had directly addressed equal protection claims, Judge Levinson held that sex is a “suspect category,” and that laws discriminating on the basis of sex must be subject to “strict scrutiny.” 74 Hawaii at 580, 852 P.2d at 67.

On motion for reconsideration or clarification, Chief Justice Moon, Associate Justice Levinson, and newly appointed Associate Justice Paula Nakamura declared that the heterosexual marriage requirement was presumptively unconstitutional unless the state established that it furthers “compelling state interests and is narrowly drawn to avoid unnecessary abridgements of

constitutional rights.” 74 Hawaii at 646, 852 P.2d at 67.

## **B. Critique**

### **1. Justice Levinson failed to understand the historical basis for the Loving v. Virginia equal protection analysis.**

What is striking about Justice Levinson’s decision is his failure to perceive the crucial distinctions between the Virginia’s anti-miscegenation law and Hawaii’s heterosexuality requirement in its marriage law. This is all the more surprising in view of Justice Levinson’s prior holding that Hawaii’s marriage law did not violate the right of privacy because there was no “fundamental constitutional right to same-sex marriage.” Since there is no fundamental constitutional right to same-sex marriage, the role of gender in Hawaii’s marriage law required more respectful treatment than being summarily thrown upon Justice Levinson’s procrustean bed of equal protection analysis.

Justice Levinson’s sex-discrimination analogy to the racial discrimination found in Loving overlooks the unique type of discrimination that was the specific, emphatic crux of the Loving decision: White-Supremacy racism. The U.S. Supreme Court specifically described in Loving the White-Supremacist policy that historically and explicitly undergirded the Virginia laws. See 388 U.S. at 6, 7. The Court emphasized: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintenance White Supremacy.” 388 U.S. at 11.

As stated by Cass Sunstein, one of my law professors at the University of Chicago:

The key sentence in Loving says that “the racial classifications [at issue] must stand on their own justification, as measure designed to maintain White Supremacy.” The striking reference to White Supremacy--by a unanimous court, capitalizing both words and

speaking in these terms for the only time in the nation's history--was designed to get at the core of Virginia's argument that discrimination on the basis of participation in mixed marriages was not discrimination on the basis of race. . . . Viewed in context--in light of its actual motivations and its actual effects--the ban was thus part of a system of racial caste.

Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 17-18 (1994).

Justice Levinson should have recognized, as Judge Heen did, that the identical treatment of both men and women under the Hawaii marriage law makes it consistent with the equal protection provisions of Hawaii's Constitution. See 74 Hawaii at 590-93, 852 P.2d at 71-72. The heterosexual marriage requirement does not discriminate on the basis of sex because it does not "draw a line" between what men and women are permitted to do, or the governmental benefits they may obtain. Men and women are treated exactly the same by the heterosexual marriage requirement. Both genders are equally required to marry only persons of the other gender. It does not give any advantage to one gender or the other.

Justice Levinson's response to Judge Heen's insight is to impatiently refer, without any analysis, to Loving's rejection of the equal application argument in the context of Virginia's anti-miscegenation statute. Justice Levinson brushes Judge Heen's objection aside without noting that the Supreme Court in Loving did not declare that equal application to both classes was an irrelevant consideration or an unacceptable answer to a charge of violation of equal protection generally. The Supreme Court only rejected the specific equivalence argument in the context of racial discrimination in a scheme designed to enforce White Supremacy.

**2. Justice Levinson failed to analyze the marriage institution in relation to equal rights for women**

In order to overcome the facial neutrality of Hawaii's heterosexuality requirement, there

would need to be convincing evidence that the marriage law's intent or effect was to unfairly favor one sex over another. No such analysis was even attempted by Justice Levinson. There is certainly no evidence in the record of this Commission supporting such a thesis.

**3. Justice Levinson failed to recognize the sex-integrative role of marriage**

Statutes prohibiting homosexual marriage do not convey any sexist message about the inferiority or superiority of one gender in relation to the other. Indeed, by requiring one person of each sex, such laws convey an unmistakable message about the indispensable equality, equal worth, and equal contribution of both sexes.

If I can draw an analogy, it would be to envision a society consisting exclusively of black and white individuals, with the biological possibility of children resulting only from interracial marriages. Curiously, the children born to these unions are either black or white. Tradition over the course of millennia requires one black and one white to any marriage. In addition to the obvious benefit of continued procreation of offspring, this social convention has effectively integrated the races and promotes interracial harmony. An attempt by two whites or two blacks to argue they should be allowed to practice racial separatism would be seen as obviously not in society's best interests, and would be justifiably rejected.

For Justice Levinson to analogize Hawaii's heterosexual marriage law requirement to Virginia's White Supremacist anti-miscegenation law is the ultimate irony. Justice Levinson should have recognized that the sexual apartheid implicit in homosexual marriage is the more valid analogy to the anti-miscegenation statutes of the South.

If after careful consideration and discussion of these arguments, Justice Levinson still was unable to agree that Hawaii's marriage law does not discriminate on the basis of sex, Justice

Levinson could have applied most the type of intermediate standard urged by Justices Brennan, White, Marshall, and Blackmun in Regents of the University of California Regents v. Bakke, 438 U.S. 265 (1978). These justices held that strict scrutiny should not be applied to racial classifications intended to remedy past racial discrimination. Instead, the intermediate standard of review developed by the Supreme Court in sex discrimination cases was more appropriate. Yet even this more limited standard of review is arguably inappropriate in such instances. See Laurence H. Tribe, American Constitutional Law (1988) at 1521-1544.

**4. Justice Levinson did not consider the intent of the framers of Hawaii's equal protection and equal rights provisions.**

Most disconcerting is Justice Levinson's failure to consider the intent of the framers of Hawaii's equal protection and equal rights provisions. There is simply no discussion about the intent of the drafters or of the voters who ratified these constitutional provisions.

Whatever else may be said about the Fourteenth Amendment to the U.S. Constitution, it is undeniable from both its text and its history that it was precisely intended to outlaw state action designed to foster White-Supremacy racism by forcing acceptance of the idea of the racial inferiority of Black Americans, like Mrs. Loving, and to protect the legal rights of white Americans, like Mr. Loving, who accepted to full personal and social equality of Blacks.

By contrast, nothing in the text or history of the Hawaii equal protection and equal rights provisions discloses a comparable intent to protect or promote the social, legal or political equality of homosexual relations. Had Justice Levinson attempted to ascertain the intent of the framers of Hawaii equal protection provisions, it is likely he would have reached the same conclusion as Mr. Britt of the Commission has: "It appears equally clear the Hawaii supporters of

the State's special gender guaranties and equal protection guarantees, did not entertain ending gender discrimination in marriage." Memorandum, October 20, 1995 to Chair Thomas Gill, and Commissioners, Commission on Sexual Orientation and the Law.

**C. Legislative response**

After the Hawaii Supreme Court decision in Baehr, the Hawaii legislature amended the law to clarify in unmistakable language that marriage is permitted only between a man and a woman. Hawaii 1994 Session Laws, 1994 Regular Session of the 17th Legislature, Act 217. As a political price for the clarifying statute, however, liberal legislators obtained a provision in the legislation establishing an eleven-member Commission on Sexual Orientation and the Law.

After federal lawsuit resulted in the removal of four members of the Commission, the legislature passed and Governor Cayetano approved a new bill authorizing the appointment of a new seven-member commission. Hawaii 1995 Session Laws, 1995 Regular Session of the 18th Legislature, Act 5.

Act 5 tasks the Commission to:

- (1) Examine the precise legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples;
- (2) Examine whether substantial public policy reasons exist to extend or not to extend such benefits in part or in total to same-sex couples; and
- (3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

**II. Legislative action?**

Comprehension of the errors contained in Justice Levinson's Baehr v. Lewin opinion



is critical to responding to the legislature's charge to the Commission to "[r]ecommend appropriate action which may be taken by the legislature to extend [legal and economic benefits extended to married opposite-sex couples] to same-sex couples." This reference to "benefits" has its genesis in Justice Levinson's assertion that because homosexual couples are not allowed to marry, they are deprived "of access to a multiplicity of rights and benefits that are contingent upon [marital] status." 74 Hawaii at 560, 852 P.2d at 59.

It appears that the legislature believes itself hostage to Justice Levinson's analysis, and has decided that if it can extend the same "legal and economic benefits" to homosexual couples as are extended to married couples, the "problem" of Baehr v. Lewin will be solved politically, and perhaps marriage can remain an exclusively heterosexual institution. The problem with this approach is that it is futile. The fundamental "legal and economic benefits" of marriage are so bound up with the institution of marriage as it has developed over the course of millennia as to be inseparable from marriage. Justice Levinson notwithstanding, marriage is not a creature of the state, even where the state claims the right to exclusively license it, and the legal and economic benefits of marriage extend much further back in time than the creation of the State of Hawaii.

Moreover, as Professor Randall W. Roth stated to this Commission in his review several legal consequences of marriage: "All could be considered 'benefits,' but in most cases have the potential to be 'detriments.' . . . These brief comments about just a few, selected areas of the law illustrate that marriage can have powerful legal consequences--sometimes good, sometimes not."

There are three legal responses to actions of individuals. The category concerning least favored conduct can be called "prohibited conduct." This includes activities and associations that the law proscribes, outlaws, bans and forbids--usually by means of criminal prohibition. The

second category can be called “permitted relationships and behavior.” This includes connections and actions that are tolerated, condoned, and allowed. The third category can be called “preferred relationships and conduct.” It includes those relations and activities that are singled out for special approval, encouragement, and preference, including those officially endorsed as fundamental to our society, culture, and democratic way of life.

Historically, homosexual relations have been consistently placed in the prohibited category. Since the passage of the penal code, Hawaii has not punished private homosexual relations between consenting adults. Nor does it punish adultery or fornication. Several other states also now take this approach. But no state has yet to move to reclassify the status of homosexual relations from “prohibited” to generally “preferred” behavior. That is precisely what the proposal to legalize homosexual marriage or marriage-like domestic partnerships would do. Marriage is one of the oldest and most widely-respected types of preferred, specially protected relations. The gay/lesbian demand that homosexual couples be allowed to marry is a demand for special preferred status for homosexual relations. The demand for same-sex marriage is not merely a demand for “tolerance” of homosexual relations. Rather, it is a claim for the highest type of specially preferred, exceptionally secured status that the law confers.

The domestic partnership proposals that I have reviewed lack a persuasive rationale other than as a response to Justice Levinson’s view of constitutional law. Why is domestic partnership to be limited to just two individuals? Business partnerships usually include more than two persons. Why is an individual limited to just one domestic partnership? Business partners, unless they agree otherwise, can also belong to other partnerships. Any why do we want to encourage the formation of these partnerships anyway? Why should people who are single and

choose to live alone be required to pay taxes that are not only used to favor married couples through the provision of government economic benefits, but favor pairings of homosexual couples?

The reference in one piece of proposed legislation to marital status discrimination in employment in the legislative findings section is puzzling, since such discrimination is already prohibited by law.

Domestic partnerships are the means of conferring preferred status upon homosexual couples, but without calling it marriage. It will thereby dilute the significance of marriage, and encourage the sexual apartheid I have described above. I therefore believe this Commission should inform the legislature that any means of extending the traditional benefits and obligations of marriage to homosexual couples is inappropriate.

As an alternative, I would propose that certain government bestowed economic benefits based upon marital status might be viewed as unnecessary to the continued viability of marriage, and simply eliminated. Such removal would make the law more neutral with regard to marital status, without conferring preferred status upon homosexual groupings.

# THE HAWAII LEGISLATURE HAS COMPELLING REASONS TO ADOPT A COMPREHENSIVE DOMESTIC PARTNERSHIP ACT

by Thomas F. Coleman

In May 1993, the Hawaii Supreme Court issued its landmark decision in *Baehr v. Lewin* (1993) 74 Haw. 645, 852 P.2d 44. In *Baehr*, the judicial branch of government essentially challenged the executive and legislative branches to justify the state's current legal treatment of same-sex couples. Invoking the equal protection clause of the Hawaii Constitution, the justices ordered the state to show cause why same-sex couples should not be allowed to get married under Hawaii law and thereby obtain all of the benefits and incur all of the obligations of state-sanctioned marriage.

The executive branch, through the office of the Attorney General, has been preparing to defend the status quo in an upcoming trial that will commence in July 1996. Under the status quo, same-sex couples may not marry. As a result, gay and lesbian partners who have long-term committed relationships are denied scores of benefits associated with marriage. For example, a spouse can sue a drunk driver who wrongfully kills her mate. Same-sex couples have no such right to sue. An employee can put his or her spouse on a health plan at work. Same-sex couples have no right to such health benefits. Married couples can file a joint tax return if they find it financially beneficial to do so. Same-sex couples can't. The list of benefits currently available to married couples but that are denied to same-sex couples could go on and on.

Under the status quo, an opposite-sex couple who is married for just one day is entitled to dozens of special legal protections and benefits. However, same-sex partners who have lived together in an intimate and interdependent relationship for 20 years are basically considered strangers in the eyes of the law. It is hard to imagine legally sound

reasons for such disparate treatment. As a result, most legal scholars and commentators believe that the Attorney General of Hawaii will be unsuccessful in defending the status quo in court, that is, unless the Legislature changes the status quo before the *Baehr* case returns to the Supreme Court.

Although the Legislature has criticized the decision of the Supreme Court in *Baehr* and has steadfastly refused to legalize same-sex marriage through the legislative process, it has nonetheless expressed a willingness to reexamine the status quo with an eye toward possible legal reform. The Legislature established a Commission on Sexual Orientation and the Law to study legal, economic, social, and policy issues that may be involved in such reform, directing the Commission to recommend an appropriate legislative response to the challenge presented by the Supreme Court's decision in *Baehr*.

An analysis of the legislation that created the Commission suggests that the Legislature is looking for a solution -- a mechanism to eliminate unjust treatment of same-sex couples -- that does not require the legalization of same-sex marriage. Some legislative leaders have spoken openly of a domestic partnership act as an appropriate legislative action. The Governor has indicated that he would sign such measure if it is presented to him by the Legislature.

This article explores reasons why the Legislature may prefer a comprehensive Domestic Partnership Act as an alternative to court-mandated same-sex marriage. If lawmakers fail to pass such a bill, the Supreme Court will not have the opportunity to evaluate the constitutionality of this option.

The Commission on Sexual Orientation and the Law should recommend this approach so that all policy choices are ulti-

mately considered by the Legislature and the Supreme Court before *Baehr v. Lewin* is finally decided.

The factual information, and legal precedents, cited in this article reflect realities that should be considered as the Commission on Sexual Orientation and the Law deliberates what to recommend to the Hawaii Legislature. The purpose of this article is not to support or justify the status quo, but to report it accurately so that policy recommendations are based on historical precedents, evolving social attitudes, and current political realities.

Some of the court decisions cited within are more than 10 or 20 years old, and as a result, the judges writing those opinions did not have the benefit of considering many of the social and legal changes that have occurred in American society in subsequent years. Nonetheless, these decisions have not been overturned and therefore remain as valid judicial precedents that may not be rejected out of hand.

It is hoped that the information and arguments contained in this article will fill an advocacy void that currently exists in the debate over same-sex marriage.

The viewpoints from both ends of the political spectrum, i.e., those advocating same-sex marriage and those advocating no change at all, have been well represented in the judicial and legislative processes so far. What has been missing from the debate is a voice for those caught in the middle -- persons who respect diversity and who want to see an end to unjust discrimination, but who believe that legalizing same-sex marriage is not the appropriate approach, at least not at this time in history.

The people in the middle, those with moderate political views on this subject, include gays and straights, men and women, republicans, democrats, and independents. Some simply prefer gradual social and legal change. Others, especially some in the gay and lesbian community, fear a political backlash if same-sex marriage is legalized at a

time when two-thirds of the public opposes such a move.<sup>1</sup>

In an attempt to find common ground among persons of good will from all political perspectives, this article proposes the passage of a comprehensive domestic partnership act as a political solution that may satisfy the equal protection requirements of the Hawaii Constitution.

#### THE LEGISLATIVE HAS COMPELLING REASONS TO CHOOSE DOMESTIC PARTNERSHIP OVER SAME-SEX MARRIAGE

There are many reasons why the Hawaii Legislature may decide to pass a comprehensive domestic partnership act rather than have the judiciary order the state to issue marriage licenses to same-sex couples. Even if each reason alone would not be sufficient to satisfy the Supreme Court, collectively these state interests may be compelling enough to: (1) prompt the Legislature to pass such an act, and (2) convince the court to accept domestic partnership as an adequate remedy to provide same-sex couples equal protection under Hawaii law.

##### *1. The Legislative Process Normally Involves Gradual Change Rather than Radical Reform*

Most legislators, like most people, are usually moderate in their political and social views. They understand that life is not static. In order to be responsive to the needs of their constituents, legislators know that public policies, and the laws that reflect those policies, must adapt to keep pace with the changing conditions of society.

The Hawaii Legislature has passed law reform measures over the past two decades that reflect changing attitudes about homosexuality. It was one of the first state legislatures to decriminalize private homosexual acts between consenting adults. (*1972 Hawaii Laws*, ch. 9, sec. 1.) Four years ago, legislators took another major step forward by

prohibiting sexual orientation discrimination in employment, housing, and public accommodations. (1991 Hawaii Laws, ch. 2, sec. 1.) Passage of a domestic partnership act would be the logical next step as the process of law reform continues.

When fundamental rights are not being denied, the federal Constitution gives much leeway to legislators as they respond to demands for reform. The United States Supreme Court has acknowledged the prerogative of the legislative branch to opt for gradual change rather than radical reform, stating: "[A] legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' ...." (*Katzenbach v. Morgan* (1966) 384 U.S. 641, 657.)

The Hawaii Supreme Court has acknowledged that same-sex marriage is not a fundamental right under the federal Constitution. The nation's highest court "was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental." (*Baehr v. Lewin*, *supra*, 852 P.2d, at p. 56.)

The court declined to recognize a new fundamental right to same-sex marriage under the state Constitution, stating:

"[W]e 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 of privacy or otherwise." (*Baehr*, *supra*, 852 P.2d, at p. 57.)

The court emphasized that judges are not free to declare fundamental rights on the

basis of their own "personal and private notions," but must look to the "traditions and collective conscience" of the people to determine whether a principle is so rooted there as to be ranked fundamental. (*Ibid.*) The court accepted the fact that marriage has traditionally been limited to opposite-sex couples. However, it suggested that the state's equal protection clause would provide "a potential remedy" to same-sex couples.

The decision in *Baehr* clearly underscored the government's need to respect societal traditions and the collective conscience of the people. However, it also highlighted the need to eliminate unjust discrimination.

By passing a comprehensive domestic partnership act, the Legislature could balance these competing interests, and at the same time continue the process of incremental change. Such an act would confer all the rights and obligations normally associated with marriage upon same-sex couples who obtained a Certificate of Domestic Partnership from the state.

Passage of such an act may also satisfy the demands of the equal protection clause of the Hawaii Constitution to the extent that domestic partners are given all the rights and obligations that Hawaiian law confers on married couples.

## *2. The Public Overwhelmingly Opposes Same-Sex Marriage but Favors Domestic Partnership*

The Legislature is the political branch of government. As elected officials, legislators have a duty to represent their constituents. In a representative democracy, legislators usually carry out the will of the people.

Public opinion plays an important role in the political process. Therefore, in the debate over whether to legalize same-sex marriage, public opinion on the subject of homosexuality must be taken seriously.

It seems that nearly everyone who considers the issue of same-sex marriage understands that the issue of homosexuality is involved in the debate.

The plaintiffs in *Baehr* themselves injected the issue of homosexuality into the case by "Proclaiming their homosexuality and asserting a constitutional right to sexual orientation." (*Baehr, supra*, 852 P.2d, at p. 52.) The Attorney General countered that the plaintiffs did not have a right "to enter into state-licensed homosexual marriages." (*Id.*, at p. 51.) The trial court concluded that "homosexual marriage" is not a fundamental right. (*Id.*, at p. 54.) Justice Burns, who wrote a concurring opinion in the Supreme Court felt that the outcome of the case hinged on the nature and origins of sexual orientation in general, and homosexuality in particular.

A majority of Supreme Court justices, however, insulated themselves from dealing with the issue of homosexuality by declaring that the sole issue in the case was that of sex discrimination. According to them, homosexuality had nothing to do with the issue of same-sex marriage.

In a sense, these Supreme Court justices exalted form over substance. They were correct that the case involved sex discrimination inasmuch as marriage has been limited to partners of opposite genders. However, by unrealistically narrowing their judicial focus, and ignoring human experience, the Supreme Court majority erroneously concluded that homosexuality was irrelevant to the issue of same-sex marriage.

The concept of "marriage" carries with it implications or assumptions of sexual intimacy between the marriage partners. No one would seriously question the fact that the overwhelming majority of persons who get married are involved in a sexual relationship with each other. Although the status of marriage does not *require* sexual relations between spouses, nearly all persons who marry would contemplate such intimacy as part of the marriage relationship.

Laws are enacted in contemplation of probabilities, not theoretical possibilities. Therefore, when the Legislature considers the issue of same-sex marriage, it is reason-

able for the Legislature to assume that most same-sex couples who would get married, if marriage were available to them, would be involved in a homosexual relationship. As a result, the Legislature may appropriately consider public opinion concerning homosexuality as it grapples with the prospect of same-sex marriage.

The general public is overwhelmingly opposed to the legalization of same-sex marriage. National opinion polls consistently show that the general public is opposed to gay marriage by a 2 to 1 margin. A survey of registered voters would probably show 70% opposed to legalizing same-sex marriage.<sup>7</sup>

Polling in Hawaii has shown similar attitudes about same-sex marriage, with 67% of respondents opposed, 25% in favor, and 8% unsure.<sup>7</sup> If the "unsure" respondents were forced to choose and assuming they split evenly, the result would be that 71% of the general adult population in Hawaii is opposed to same-sex marriage. Making adjustments for more conservative attitudes of voters, in contrast to the public at large, this could translate into 75% of Hawaiian voters being against the legalization of same-sex marriage.

Contrast this with growing support for domestic partnership rights. In 1984, the city of Berkeley, California became the first employer in the nation to grant employee benefits, such as health and dental coverage, to the domestic partners of its employees. Today, hundreds of public and private employers offer such benefits.

Public employers have done so through the democratic process. City council members, as elected representatives of the people, have voted to support domestic partnership benefits. In two instances where the issue was placed on the ballot, voters in San Francisco and Seattle supported the concept of domestic partnership.

Actions of California legislators also provide some indication of public attitudes about domestic partnership versus same-sex marriage. In 1977, the Legislature voted to

restrict marriage to opposite-sex couples. In 1991, a bill was introduced (AB 167) to legalize same-sex marriage. The bill died when it was unable to gain the support of even one member of the democrat-controlled Assembly Judiciary Committee.

In sharp contrast, both houses of the California Legislature passed AB 2810 in 1994. The bill would have established a statewide domestic partnership registry, entitling domestic partners to various benefits. Although the bill was ultimately vetoed by the Governor, its passage through the legislature demonstrated a growing public acceptance of domestic partnership rights, despite continuing strong opposition to same-sex marriage.

Gains made by employees in the private sector also evidence growing public support for domestic partnership. Today, hundreds of private employers, and dozens of unions, provide domestic partner employment benefits such as sick leave, bereavement leave, medical and dental insurance, and sometimes pension survivor benefits.

Public support for domestic partnership benefits stems from several attitudes. Although the public takes a narrow view of "marriage," the contrary is true with respect to the concept of "family." For example, a national poll conducted in 1989 by Massachusetts Mutual Life Insurance Company showed that 74% of adults defined "family" as a group of people who love and care for each other, while only 22% stuck to a rigid definition of family as "a group of people related by blood, marriage, or adoption."

The concept of same-sex domestic partnership rights seems to reconcile conflicting public attitudes about homosexuality. Although 61% of adults believe that "gay sex is always wrong," 63% oppose making consenting adult homosexual relations a crime,<sup>5</sup> and more than 70% oppose discrimination against gays in employment and housing, and a majority of adults would support a civil rights bill to prohibit such discrimination.<sup>6</sup>

The public seems to be sending a

clear message to its elected representatives. They oppose discrimination against gays and lesbians, but do not want lawmakers to legalize same-sex marriage. However, with growing public support for the use of inclusive definitions of "family" and increasing comfort with the concept of domestic partnerships, passage of a comprehensive domestic partnership act is the appropriate political remedy to eliminate unjust discrimination against same-sex couples.

### ***3. Legalizing Gay Marriage in Hawaii Would Create Havoc in Intergovernmental Relations***

Although Hawaii consists of several islands, the government of Hawaii is not isolated from the rest of the world. Hawaii has formal legal ties to the federal government and to each of the other 49 states. It also has legal and economic connections with many foreign nations.

As it ponders how to respond to the constitutional challenge presented in *Baehr v. Lewin*, the legislature must consider the impact that legalizing same-sex marriage, or recognizing domestic partnerships, would have on intergovernmental relations.

Passage of a domestic partnership act could provide same-sex couples all of the rights and obligations that Hawaii legislators have the authority to confer within the territorial and legal jurisdiction of the state of Hawaii. Domestic partnership rights could be limited to bone fide residents of Hawaii, with a short waiting period before partners could register their relationships. Such a measure would have few intergovernmental ramifications since neither the federal government nor any state has adopted a comprehensive domestic partnership law.

Legalizing same-sex marriage in Hawaii, on the other hand, has intergovernmental implications that are mind boggling since every state and every nation has marriage laws, and marriages in one jurisdiction are generally recognized as valid everywhere. However, since no state or nation currently



recognizes same-sex marriages, and since opposition to such recognition seems universally strong, it is likely that governments outside of Hawaii would refuse to recognize same-sex marriages performed in Hawaii.

Evan Wolfson, cocounsel for the plaintiffs in *Baehr v. Lewin*, has warned the gay community that if same-sex marriage is legalized, "there will be a tidal wave out of Hawaii that will reach ever corner of the country." A "Million Couple March on Hawaii" is not out of the question. Leaders in the gay and lesbian community predict that couples from each state in the nation will fly to Hawaii, get married, and return to their home states with marriage certificates in hand. An ongoing confrontation with each state government and a myriad of federal agencies would then begin. The state of Hawaii would be caught in the middle of these legal battles for years to come.

#### Confrontation with Congress

The legalization of same-sex marriage in Hawaii will automatically create a confrontation with Congress since the term "spouse" appears more than 1,400 times in federal statutes. Although federal law usually has deferred to state law to determine whether a couple is married, judicial precedent suggests that federal law will not recognize same-sex marriages as valid.

In *Adams v. Howerton* (9th Cir. 1982) 673 F.2d 1036, 1040, a unanimous Court of Appeals stated: "The term 'marriage' ordinarily contemplates a relationship between a man and a woman . . . . The term 'spouse' commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words." The court held that even if a gay couple secured a marriage certificate from a state government, federal law would not recognize the couple as "spouses" without specific Congressional approval.

It is unlikely that such approval will

be forthcoming anytime soon. Both houses of Congress are currently controlled by conservative legislators. It is no secret that conservative representatives, whether democrat or republican, generally favor "traditional family values" and oppose "gay rights." While a recent national poll showed that 61% of all adults think "homosexual relations are always wrong," 70% of republicans and 75% of all conservatives felt that way.<sup>9</sup>

Hawaii administers federal laws and receives federal funds for such programs as public housing, public assistance, medicare, social security, and FHA housing loans. If it legalizes same-sex marriage, Hawaii will become embroiled in costly lawsuits and possibly lose federal funds for a variety of programs when the federal government refuses to recognize two men or two women as "spouses" under federal law.

#### Confrontations with Other States

No state in the nation recognizes marriages between two men or between two women as legally valid. In fact, the trend during the past decade has been to replace gender-ambiguous marriage laws with statutes specifying that marriage is a relationship between a man and a woman.

Litigation over the definition of marriage has always resulted in the same judicial conclusion: marriage contemplates a relationship between persons of the opposite sex.<sup>10</sup>

Same-sex couples have filed lawsuits claiming that they have a constitutional right to marry. Outside of Hawaii, these lawsuits have invariably been unsuccessful.

In *Baker v. Nelson* (1972) 409 U.S. 810, the United States Supreme Court ruled that the federal constitution does not require states to issue marriage licenses to same-sex couples.<sup>11</sup> More recently, in *Dean v. District of Columbia* (1995) 653 A.2d 307, the District of Columbia Court of Appeal ruled that same-sex marriage is not a fundamental right protected by the due process clause of the federal Constitution.

State courts have also denied constitutional challenges to marriage laws that recognize only opposite-sex relationships. In *Singer v. Hara* (1974) 552 P.2d 1187, 1191, an appellate court in the state of Washington ruled that denying a marriage license to same-sex couples did not violate the equal protection clause of the state constitution. Recently, an appeals court in New York ruled that the state's refusal to consider same-sex couples as "spouses" did not deny them equal protection of the law. (*In re Cooper* (1993) 592 N.Y.S.2d 797.)

With the Hawaii Supreme Court on the verge of legalizing same-sex marriage, legislators in some states have introduced bills to reaffirm that same-sex marriages performed out of state will not be recognized in their home state.

**Full Faith and Credit.** Many gay rights activists hope that the Full Faith and Credit Clause of the federal Constitution will require each of the other 49 states to legally recognize same-sex marriages performed in Hawaii. However, such a result is unlikely.

As one law review article has summed up the problem:

"Because each state possesses a great interest in the marital relationships within its borders, each state has traditionally been sovereign to decide for itself who should be able to occupy these relationships. Therefore, a situation may arise where citizens from other states will flock to Hawaii to obtain same-sex marriages and then return to their domiciles. If all states are forced to recognize these marriages, Hawaii will effectively encroach upon the sovereignty of other states."<sup>2</sup>

Another legal commentator has predicted that many states "will fight tooth and nail to preserve the status quo and to prevent same-sex couples from entering their territory."<sup>3</sup> Rather than compelling interstate recognition of marriage under the Full Faith and Credit Clause, he forecasts that the United States Supreme Court "will most likely consign the question to the 'dismal

swamp' of conflicts law" and as a result, "the battle for recognition of same-sex marriages will be fought state by state. . . ."

Some precedents suggest that the Full Faith and Credit Clause will not prove to be the legal magic wand that many gay rights activists are hoping for. For example, in *Pacific Employers Ins. Co. v. Industrial Accident Commission of California* (1939) 306 U.S. 493, 504-505, the federal Supreme Court stated that "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." This is because there is a "public policy" exception to the Full Faith and Credit Clause.

In *Nevada v. Hall* (1979) 440 U.S. 410, 424, the Supreme Court ruled that the Full Faith and Credit Clause did not require California to enforce a Nevada statute where doing so would "be obnoxious to its statutorily based policies."

The court explained the public policy exception another way in *Carroll v. Lanza* (1955) 349 U.S. 408, 412:

"The Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting conflicting and opposed policy."

The Supreme Court has refused to force state governments across the nation to recognize the right of consenting adults of the same sex to have intimate relations in the privacy of their own home. In *Bowers v. Hardwick* (1986) 487 U.S. 186, the court upheld the authority of the states to impose criminal penalties on such conduct. It seems unlikely that the Supreme Court would authorize the criminalization of homosexual conduct, and at the same time require every state to recognize Hawaiian same-sex marriages as valid everywhere, with all of the rights and benefits attached thereto.

Therefore, if Hawaii legalizes same-sex marriage, one can realistically expect

dozens, if not hundreds, of lawsuits filed throughout the nation demanding legal recognition everywhere. The end result will likely be a Supreme Court decision declaring that there is no federal right to such recognition, thus prompting a new round of lawsuits under state constitutional law.

The state of Hawaii, however, will not merely sit on the sidelines as a spectator watching the explosion of lawsuits. Hawaiian courts, and other agencies of Hawaiian government, will be drawn into legal battles involving individuals, corporations, and government agencies in other states.

*Interstate Compacts.* The state of Hawaii is a signatory to a variety of Multistate or Interstate Compacts. For example, Hawaii has signed the Multistate Tax Compact (HRS § 255-1), the Adoption Assistance Compact (HRS § 350C-4), the Interstate Compact on Placement of Children (HRS § 350E-1), the Interstate Compact on Juveniles (HRS § 582-1), and the Western Interstate Corrections Compact (HRS § 355-1).

These are binding and enforceable contracts. One party to such a contract may not unilaterally change its terms. Since "marriage" and "spouse" have always been considered to involve only opposite-sex relationships, what will happen if Hawaii changes the definition to include same-sex couples? If other signatory states resist, as they likely will, litigation will result. At what cost to the taxpayers of Hawaii, for how long, and with what result?

Imagine litigation under the Western Interstate Corrections Compact. Hawaii prisoners who are temporarily housed in California may demand conjugal visits with a same-sex spouse. If California refuses, will the state of Hawaii sue California for breach of contract because a convicted murdered or arsonist is being denied equal rights as guaranteed by the interstate compact?

Will Utah or Nevada agree to the placement of children in Hawaiian same-sex marriages on the same terms and conditions as opposite-sex marriages? If not, will they

withdraw from the compact or sue Hawaii for breach of contract because Hawaii unilaterally changed a material term of the agreement?

These problems are avoided by passage of a comprehensive domestic partnership act. Domestic partners would receive the same rights and obligations of spouses under *Hawaii law*, but states signing interstate compacts with Hawaii would not be forced to recognize such relationships as marriages, unless and until the signatory states signed a new interstate compact to that effect.

*Uniform Codes.* Hawaii also has adopted more than a dozen uniform state laws, such as the Uniform Partnership Act (HRS § 425-104), Uniform Commercial Code (HRS § 490:1-102), Uniform Transfers to Minors Act (HRS § 553-A-23), Uniform Probate Code (HRS § 560:1-102), Uniform Fraudulent Transfer Act (HRS § 651C-1), and the Uniform Reciprocal Enforcement of Support Act (HRS § 576-23), to name a few.

If Hawaii is the only state to legalize same-sex marriage, one of the purposes of adopting a uniform code will be frustrated. States that adopt uniform laws basically agree to be team players.

For example, the Hawaii Legislature has declared a strong public policy in favor of judicial interpretation of uniform codes consistent with other adopting states. HRS § 1-24 instructs the Hawaii judiciary that "All provisions of uniform acts adopted by the state shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them."

The legislature has emphasized the importance of this public policy by including a specific mandate of uniform interpretation in many of the specific uniform codes." The state's interest in being a team player and adopting common definitions of basic terms such as "spouse" or "marriage" is undermined if Hawaii "does its own thing" on same-sex marriage.

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However, passage of a domestic partner act could avoid this unfavorable consequence. The definition of "spouse" in the uniform codes could remain unchanged. The domestic partnership act would be contained in a separate omnibus statute that would create a new institution called "domestic partnership." This act, however, would clarify that, for purposes of all Hawaii laws, domestic partners would receive the same benefits and obligations as spouses. As a result, Hawaii could continue to be a team player in the uniform code system, but offer equivalent benefits and obligations to same-sex spouses under different terminology.

### International Relations

Same-sex *marriage* is not currently recognized by any nation. However, "registered partnership" laws have been enacted in Sweden, Norway, and Denmark, but these nations have not opened up the institution of marriage to same-sex couples.<sup>13</sup>

The United States is not alone when it comes to political and legal protests against the exclusion of same-sex couples from legalized marriage.

In Canada, the Ontario Divisional Court recently ruled that denying marriage licenses to same-sex couples does not violate Canada's Charter of Rights and Freedoms, which is equivalent to the U.S. Constitution. (*Layland v. Ontario* (1993) 104 D.L.R.4th 214.) Just this year, the Canadian Supreme Court ruled in a 5 to 4 decision that the Charter did not require the federal government to provide old-age pensions to same-sex couples. (*Egan v. Canada*, File No. 23636, May 25, 1995.) On the political front, only this year the Canadian House of Commons rejected a proposal to extend legal recognition to same-sex marriages. The vote was 124 to 52, a 70% to 30% ratio that is strikingly similar to public opinion in the United States.<sup>14</sup>

Germany's high court upheld that nation's ban on same-sex marriage on Octo-

ber 13, 1993. Although the court ruled that the ban was not unconstitutional, the justices acknowledged that gay couples need more legal rights.<sup>15</sup> Gay civil rights activists are currently pressing the German Parliament to pass a domestic partnership law.

In Israel, court decisions have brought limited benefits to gay couples. On November 30, 1994, the Israel Supreme Court ruled that El Al airlines must extend the same benefits to partners of gay employees as it does to partners of heterosexuals.<sup>16</sup> However, earlier this year an Israeli judge ruled that the same-sex lover of any army colonel was not entitled to survivor benefits.<sup>17</sup>

It is worthy of note that Canada, Germany, and Israel are among the more politically and socially enlightened nations of the world. If they have recently refused to recognize same-sex marriage, one can only imagine the level of resistance that must exist in most other parts of the world.

However, despite international reluctance to recognize same-sex marriage, it is possible that beginning in 1996, Hungary may become the first nation to break ranks with the rest of the political world on the issue of same-sex marriage.

On March 8, 1995, the Constitutional Court of Hungary issued a ruling involving same-sex marriages.<sup>18</sup> The court upheld the exclusion of same-sex couples from ceremonial marriages. "Despite growing acceptance of homosexuality [and] changes in the traditional definition of family, there is no reason to change the law on [civil] marriages," the justices wrote.<sup>19</sup>

However, the court ruled that excluding same-sex couples from the benefits of common law marriage was unconstitutional. "It is arbitrary and contrary to human dignity ... that the law [on common law marriages] withholds recognition from couples living in economic and social union simply because they are of the same sex," Reuters wire service quoted the court as saying.<sup>20</sup>

A couple who permanently live together and are in a sexual relationship are

legally defined as being in a common law marriage in Hungary. Under that nation's laws, common law marriages provide partners with the same privileges granted to couples who have civil ceremonies.

The Hungarian Supreme Court ordered Parliament to make the changes necessary to implement common-law gay marriage by March 1, 1996. Thus, by next year, Hungary may be the first nation to legalize same-sex marriage, albeit as a "separate but equal" institution to ceremonial marriage.

Holland is also considering the idea of legalizing same-sex marriage. According to a Dutch newspaper, the minister of justice and the secretary of state for internal affairs submitted a plan to Parliament to change the marriage rules in that nation. With 150 members of parliament, political activists estimate that 94 are in favor of legalizing same-sex marriage, 42 are opposed, and the rest are unsure.<sup>23</sup>

However, with public opinion divided, it may be more likely that Holland will join Scandinavian neighbors in passing a "registered partnership" act instead. Forty-four percent of the Dutch public favor opening the existing marriage laws to gays.<sup>24</sup> Another 34 percent believe that a separate law should be enacted in favor of gay marriage, with restrictions on adoption, pensions, and inheritance. Only 15 percent oppose any reform.

If Hawaii legalizes same-sex marriage, it will remove itself from the recognized international consensus that marriage is an institution for opposite-sex couples. It would join the ranks of possibly one other nation, Hungary, that has gone its own way on this issue. The ramifications of such a move by Hawaii, in terms of international relations, are unknown.

#### *4. Domestic Partnership Would Distance the State from a Volatile Religious Dispute*

In the United States, the definition of marriage, the rights and responsibilities implicit in that relationship, and the

protections and preferences afforded to marriage, are now governed by the civil law. However, the institution of marriage stems from deep religious origins in Anglo-American jurisprudence. As one court aptly explained:

"The English civil law took its attitudes and basic principles from canon law, which in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible." (*Adams v. Howerton* (C.D. Cal. 1980) 486 F.Supp. 1119, 1124.)<sup>25</sup>

Although times have changed, and many religious denominations are discussing the issue of homosexual relationships with some degree of openness, the fact remains that homosexual conduct still is considered a sin by nearly all major organized religions.

Although many lay persons disagree with church dogma on issues such as contraception or divorce, most agree with official church teaching on homosexuality. For example, in a national poll of nearly 1,000 Catholics in 1987, 69% agreed that homosexual conduct was a sin.<sup>26</sup> In a national poll of 1,115 adults in 1994, more than 75% of respondents who categorized themselves as white Protestant "Born-Agains" said that homosexual relations are always wrong, and 87% of white Protestant fundamentalists felt the same.<sup>27</sup> In time, however, such strong opposition may fade.<sup>28</sup>

The Catholic Church is one of the largest denominations opposed to the legalization of same-sex marriage. Over the past decade, it has taken strong public positions on issues involving homosexuality.

For example, in 1986 the Vatican issued a letter, with the pope's approval,

instructing bishops to stamp out pro-homosexual views and to oppose any attempt to condone homosexuality through legislation or other means.<sup>29</sup> In 1992, the Vatican issued another document contesting moves to give gays equal rights, particularly in the United States. Just last year, Pope John Paul personally made a public statement against the legalization of same-sex marriage.<sup>30</sup> His statement was in response to a resolution adopted by the European Parliament that urged member nations to allow gay and lesbian couples to marry.

The Hawaii Commission on Sexual Orientation and the Law has itself heard testimony from religious leaders both opposing and supporting the legalization of same-sex marriage. Such division is not uncommon, even within the same denomination.<sup>31</sup>

Some religious leaders have shown limited support for equal rights legislation, despite the fact that recent official church pronouncements leave them little room to maneuver. For example, Bishop Louis E. Gelineau of the Roman Catholic Diocese of Providence explained his support for a new Rhode Island law prohibiting sexual orientation discrimination:

"If proposed legislation attempts to condone or promote homosexual activity by equating morally all forms of sexual behavior, then it should be defeated. If it merely seeks to afford protection from unjust discrimination, which is not now afforded under our laws, then those laws should be changed."<sup>32</sup>

To the extent that the legalization of same-sex marriage essentially places homosexuality on the same moral par with heterosexuality, religious leaders of most major denominations would probably oppose such a change. However, the creation of a new civil institution, without any historical association with religion, could help distance the state from this religious debate.

Marriage continues to be a hybrid church-state institution in the mind of the average person. The state authorizes minis-

ters to perform marriages that are then recognized by civil law. It is the church, not the state, that sets the rules as to who may perform such religious ceremonies within any given denomination. Probably the majority of marriages, even today, result from religious rituals rather than purely civil vows.

The legislature may decide *not* to entangle civil government any further with respect to marriage. The current thin wall between church and state may be constitutionally permissible for historical reasons, but the state could choose to fortify that wall with respect to same-sex couples.

Changing the definition of marriage to include same-sex couples, despite overwhelming opposition from all major religious faiths, and despite the historical ties of marriage to religion, would give the *appearance* of the state attempting to interfere with internal religious matters. Just as a judge must not only be impartial but must give the appearance of impartiality, there is virtue in the state not creating the appearance of intruding into religious matters.

Passage of a comprehensive domestic partnership law could achieve a beneficial result in terms of church-state relations. It would respect differing religious views on the subject of same-sex marriage, but would nonetheless end unjust discrimination against same-sex couples in civil law and secular society.

Under a domestic partnership act, same-sex couples would receive equal treatment with married couples under the laws of Hawaii. There would only be two differences from marriage.

One difference is the label. The other is that legalizing same-sex marriage would entangle the state of Hawaii in a myriad of disputes with each of the other 49 states, with the federal government, and with most of the international community. Passing a domestic partnership law, on the other hand, takes a major leap forward in the process of law reform and provides same-sex couples with equal rights under *Hawaii law*, without

the prospect of submerging government officials in legal and political quicksand.

Passage of a domestic partnership act, rather than same-sex marriage, will not deprive Hawaii of a prominent leadership role in the international movement for human rights. It would make Hawaii the first state in the nation to take such a positive step forward. Furthermore, a comprehensive domestic partnership law -- with *equal* rights to marriage under *state* law -- would even place Hawaii ahead of the Scandanavian nations that have been in the forefront of the movement for equal rights.

#### *About the Author*

*Thomas F. Coleman is executive director of Spectrum Institute, a nonprofit educational corporation promoting respect for human diversity. For several years he taught classes on "Rights of Domestic Partners" at the University of Southern California School of Law. As an attorney for the past 22 years, Mr. Coleman has specialized in cases involving the right of privacy, the definition of family, and marital status discrimination.*

#### **Endnotes**

1. Scott K. Kozuma, "Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy," 30 *Williamette L. Rev.* 891 (Fall, 1994), fns. 98, 99; Evan Wolfson, "Crossing the Threshold: Equal Marriage rights for Lesbians and Gay Men and the Intra-Community Critique," 21 *N.Y.U. Rev. L. & Soc. Change* 567 (1994-1995), fn. 10; William N. Eskridge, "A History of Same-Sex Marriage," 79 *W.Va. L. Rev.* 1419 (October 1993), p. 1502.

2. Polls conducted by Time Magazine showed 60% of adults opposed to same-sex marriage in 1992, 65% opposed in 1993, and 64% opposed in 1994. A national poll done by EPIC/MRA Mitchell Research showed 63% of adults opposed in 1995. Respondents in these surveys were selected from random samples of adults. None of these polls were limited to registered voters, a

constituency that tends to be more conservative than the adult population in general.

3. Jerry Burris, "Most don't support same-sex marriage," *Honolulu Advertiser*, February 25, 1994.

4. The Los Angeles Times took a national poll of 1,515 adults in July 1994. See "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19. A 1978 Gallup Poll produced similar results.

5. Louis Harris and Associates conducted this national survey of 2,254 adults in 1990. A national survey done by the San Francisco Examiner of 3,748 heterosexual adults in 1989 showed that even 63% of respondents who classified themselves as conservative felt that consenting adult homosexual relations in private should not be criminal.

6. A national Gallup Poll of 1,227 adults in 1989 showed that 71% supported equal job rights for gays. A national poll of 1,044 voters in 1977 by Time Magazine showed more than 70% said they would vote for a bill prohibiting sexual orientation discrimination in employment or housing.

7. Evan Wolfson, "No time for a luau," *The Advocate*, July 26, 1994, p. 5.

8. The Social Security Administration has also refused to recognize same-sex couples as "spouses" under federal law. In a letter from Frank Battistelli, Deputy Press Officer to Keith Clark (a San Francisco writer) in 1989, Battistelli stated: "Section 1614(d) of the Social Security Act, in discussing determinations of whether two individuals are married for SSI purposes, refers to 'a man and a woman.' . . . In addition, section 416.1806 of the SSI regulations, in discussing marital relations, refers specifically to 'an individual and an unrelated member of the opposite sex.'" (A copy of this letter is on file with the author of this article.)

9. See "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19.

10. In *Anonymous v. Anonymous* (1971) 325 N.Y.S.2d 499, a New York court ruled that a

marriage between two males was a nullity. In *Jones v. Hallahan* (1973) 501 S.W.2d 588, 589, the Kentucky Supreme Court ruled that a same-sex couple is incapable of entering into a marriage as that term is defined by state law. In *M.T. v. J.T.* (1976) 355 A.2d 204, a New Jersey appellate court concluded that a "lawful marriage requires performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." In *Murphy v. State* (1983) 653 S.W.2d 567, the Court of Appeal of Texas held that under Texas law, "two males cannot obtain a marriage license or enter into common law marriage." In *De Santo v. Barnsley* (1984) 476 A.2d 952, the Pennsylvania Superior Court ruled that "two persons of the same sex cannot contract a common law marriage." In *Maryland Commission on Human Relations v. Greenbelt Homes Inc.* (1984) 475 A.2d 1192, the Court of Appeals of Maryland declared that the law of that state did not confer any marital status on the relationships of homosexuals or lesbians. In *Gajovski v. Gajovski* (1991) 610 N.E.2d 431, the Court of Appeals of Ohio observed that two women could not marry one another.

11. The Minnesota Supreme Court ruled that the refusal of the state to issue a marriage license to a same-sex couple did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. The couple appealed to the United States Supreme Court. The nation's highest court dismissed the appeal "for want of a substantial federal question." (409 U.S. 810) A vote to dismiss an appeal for want of a substantial federal question is a vote on the merits of the case, and such a decision by the Supreme Court is binding on all lower courts until such time as the Supreme Court informs them otherwise. (*Hicks v. Miranda* (1975) 422 U.S. 332, 344; *Metromedia Inc. v. City of San Diego* (1981) 453 U.S., 490, 499.)

12. Habbib A. Balian, "Til Death Do Us Part: Granting Full Faith and Credit to Marital Status," 68 S.Cal.L.Rev. 397 (Jan. 1995), p. 400.

13. Thomas M. Keane, "Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages," 47 Stan.L.Rev. 499 (Feb. 1995), p. 531.

14. See HRS § 425-104(4), HRS § 490:1-102(2)(c), HRS § 523A-40, HRS § 551D-6, HRS § 553A-23, HRS § 554B-20, HRS § 560:1-102(b)(5), HRS § 572D-9.

15. "Sweden Joins in Approving Partnership Law for Gay Couples," *Los Angeles Times*, June 15, 1994. The domestic partnership laws in these three nations grants all the rights and obligations of marriage to registered same-sex couples, except for adoption of children, artificial insemination, in-vitro fertilization, and church weddings. In all three nations, one partner must be a citizen living in his or her home country. Denmark created "registered partnership" in 1989, Norway in 1993, and Sweden's law went into effect on January 1, 1995.

16. "Same-Sex Couples in Canada Face Setback," *Frontiers*, October 20, 1994, p. 20; *Lesbian and Gay Law Notes*, 1995, p. 140.

17. Aras van Hertum, "Germany: Court upholds marriage ban," *The Washington Blade*, October 29, 1993.

18. "Israeli Court Rules in Gay Couple's Favor," *Los Angeles Times*, December 1, 1994, p. A10.

19. Jose Zuniga, "Israel: Court says colonel's lover not due benefits," *The Washington Blade*, September 22, 1995.

20. "Hungary legalizes common-law gay marriages," *Frontiers*, April 7, 1995.

21. "Hungary legalizes common-law gay marriage," *International Gay and Lesbian Association Bulletin*, February 1995.

22. Darice Clark, "Hungary: Constitutional court recognizes gay unions," *The Washington Blade*, March 17, 1995.

23. Rex Wockner, "Netherlands to legalize gay marriage," *Frontiers*, July 14, 1995.

24. "Dutch public approves of gay marriage," *The Washington Blade*, September 8, 1995.

25. One scholar, however, has demonstrated through painstaking research that same-sex



unions were not uncommon in premodern Europe, but with the passage of time, implicit religious acceptance of formalizing such relationships turned into active institutional opposition. John Boswell, "Same Sex Unions in Premodern Europe," (Villard Books, 1994).

26. Russell Chandler, "Americans Like Pope But Challenge Doctrine," *Los Angeles Times*, August 23, 1987, part I, p. 20.

27. "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19.

28. A Gallup Youth Poll of 500 youth conducted over a three year span from 1991 through 1994 showed that 61% of Catholic teens and 55% of Protestant youth supported gay rights. (Source: Religious News Service, Los Angeles Times)

29. Donna Schanche, "Vatican Warning Seen Against Liberal Views on Sexuality," *Los Angeles Times*, October 31, 1986, part I, p. 10.

30. "Pope to Fight Resolution to Allow Gays to Marry," *Los Angeles Times*, February 12, 1994, p. B3.

31. For example, several years ago, the Episcopal Diocese of Newark, New Jersey, placed itself at odds with the majority of the nation's 3,000,000 Episcopalians when it adopted a resolution supporting the blessing of relationships of gay couples. In 1979, the church's General Convention had rejected a similar proposal by a vote of 100 to 23. ("N.J. Episcopal Group Approves Unwed Couples, Gay Lifestyles," *Los Angeles Times*, January 31, 1988.)

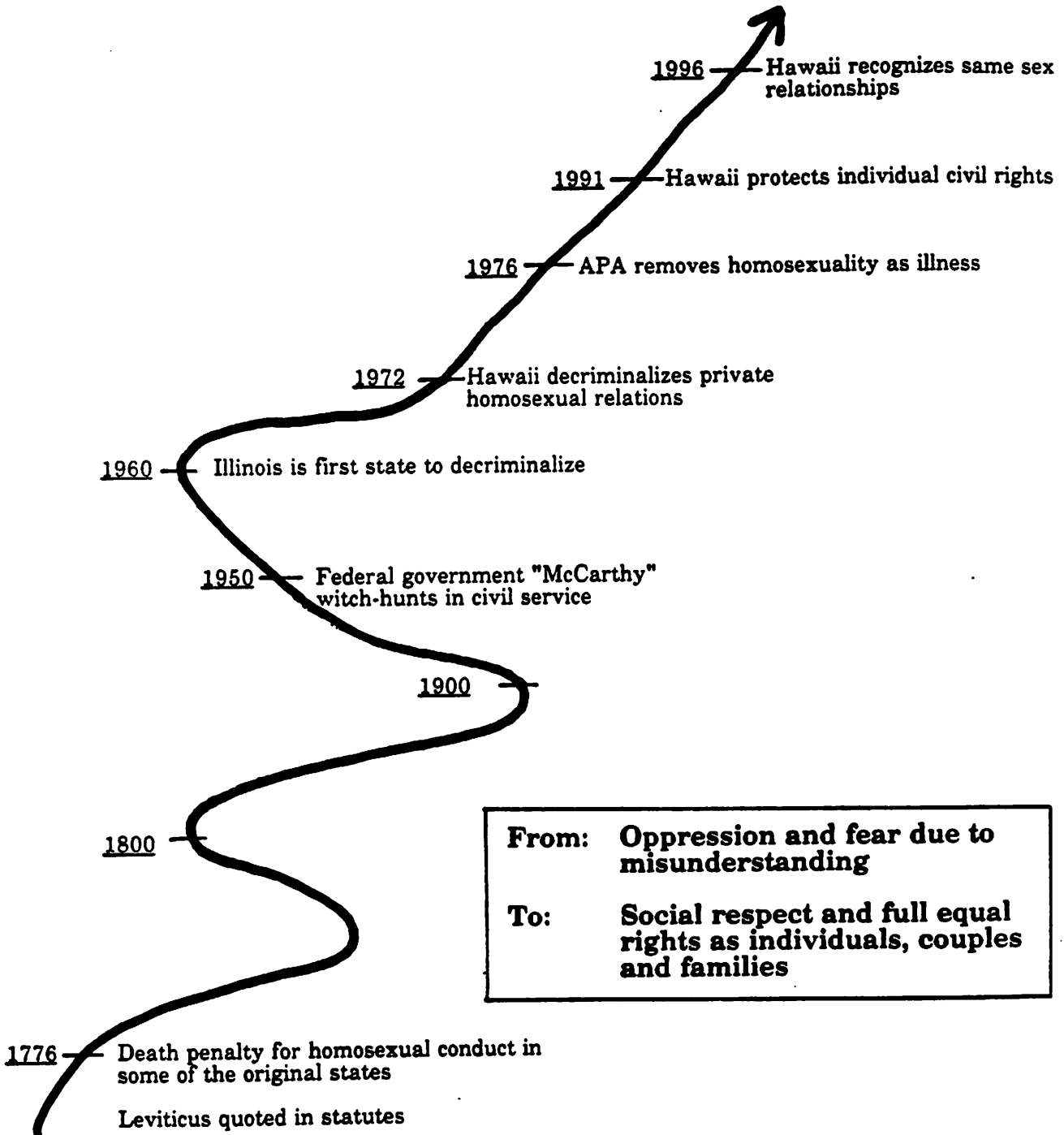
32. David W. Dunlap, "Rhode Island's Senate Sends Gay-Rights Bill to Governor," *New York Times*, May 20, 1995.

**This paper was submitted to the Hawaii Commission on Sexual Orientation and the Law in connection with testimony given by Thomas F. Coleman at the Commission's meeting in Honolulu on October 25, 1995. Mr. Coleman was an invited speaker.**

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# AN AMERICAN JOURNEY

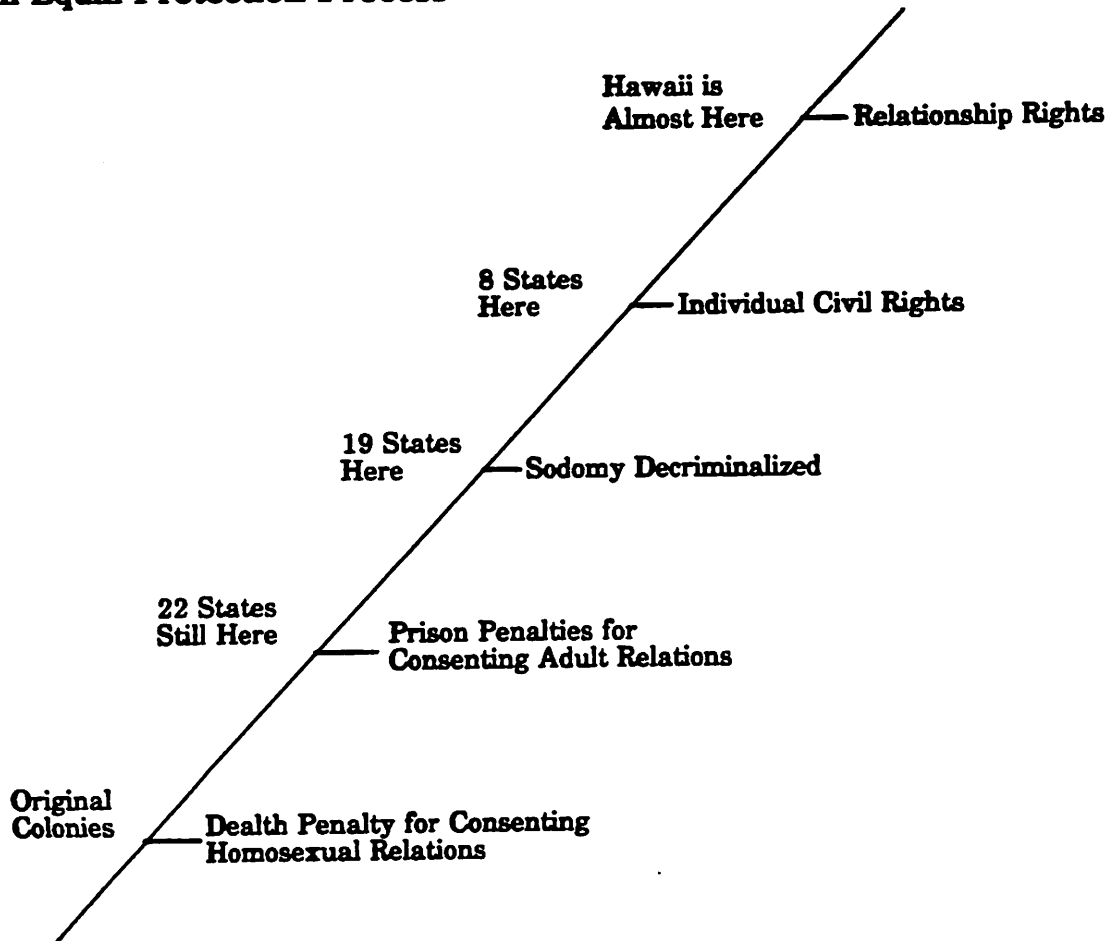
## To End Sexual Orientation Discrimination



T-11/0

# HISTORICAL PROGRESSION

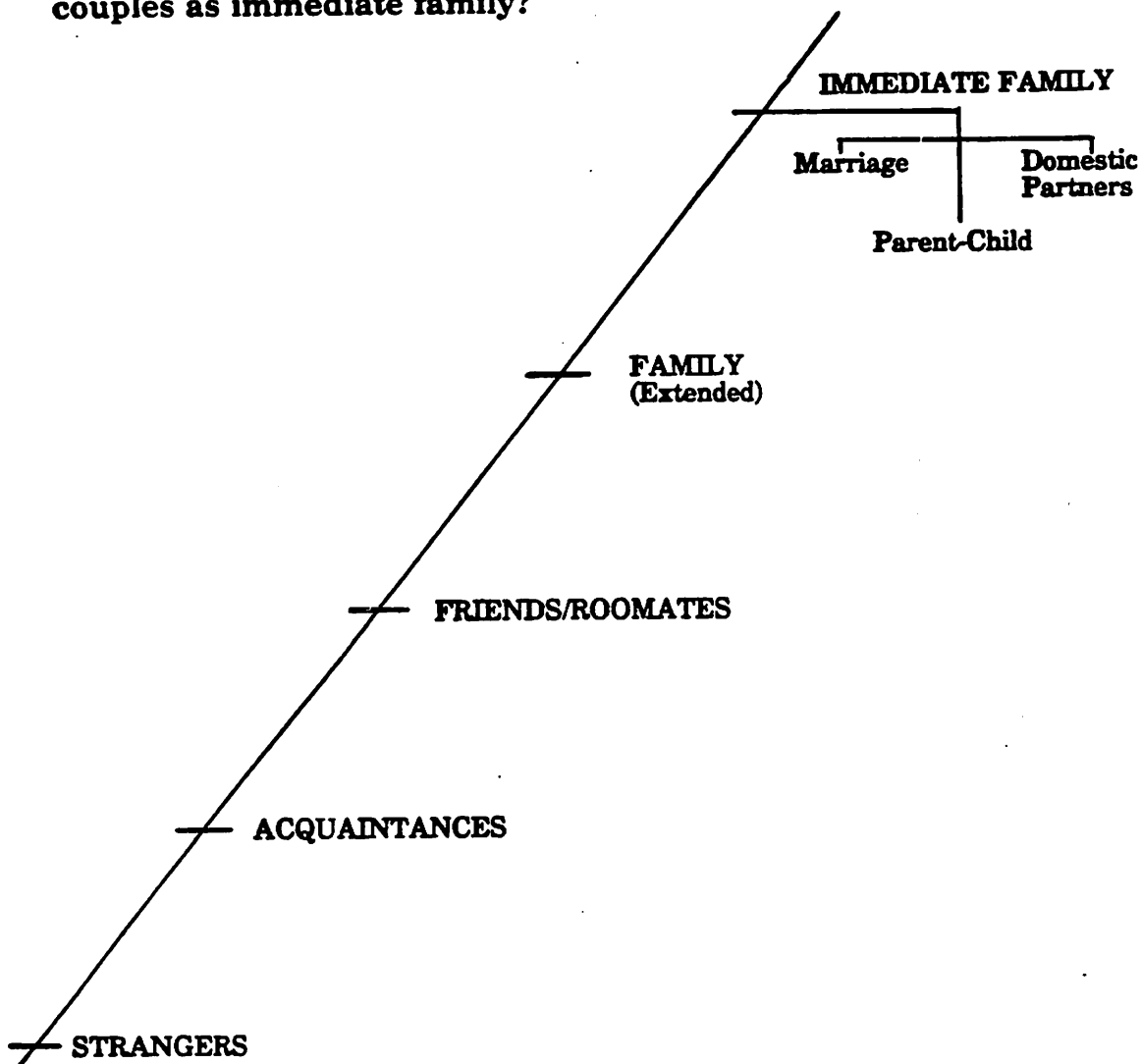
## An Equal Protection Process



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# SPECTRUM OF THE STATUS OF RELATIONSHIPS

Is equal protection satisfied if Hawaii recognizes same-sex couples as immediate family?



## NECESSARY INGREDIENTS FOR GOOD REFORM MEASURE

1. Reflects factual realities

2. Recognizes legitimate political concerns

30%	-	40%	-	30%
Same-sex Marriage		Moderate Reform		Criminalize

3. Awareness of basic legal principles

1.
  - Family Diversity = Norm
  - Same-sex couples = Families
  - Discrimination = Widespread
  - Gradual Reform = Norm
  - Church-State Concerns
  - Intergovernmental relations, federal, states, foreign
  - Public opinion
3.
  - No federal constitutional right is involved
  - Not a fundamental right under state constitution
  - State equal protection requires reform
    - Similar, but not identical treatment required
    - Equal protection as a process, viewed in context of historical progression, not one moment in time

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**MAJOR OPTIONS OF  
HAWAII LEGISLATURE**

**ACTION**

**LIKELY RESULT**

- |   |  |
|---|--|
| 1. Do nothing   | 1. Same-sex marriage is mandated by court order                |
| 2. Limited domestic partnership act (comment on draft bill) | 2. Same result as No. 1  |
| 3. Comprehensive Domestic Partnership Act                   | 3. Court may accept this as satisfying equal protection clause |
| 4. Legalize same-sex marriage                               | 4. Won't happen due to public opposition                       |
| 5. Eliminate marriage as a <u>civil</u> institution         | 5. Won't happen due to public opposition                       |

*T-11/12*

A famous Protestant minister Billy Graham has said, "If God doesn't judge America, He'll have to apologize to Sodom and Gomorrah."

Our own Hawaii nei, where I was born and raised, is very close to becoming the Sodom and Gomorrah of the world.

The actions of this commission could easily lead to same-sex marriage next year.

First, Governor Waihee signed into law Senate Bill 1811 which guaranteed no discrimination for sexual orientation.

Now, in the next legislative session, with a report from this commission, there will be a strong push for a domestic partnership law.

Some senators and representatives think that if they hand this to the gay community, it will help stop same-sex marriage.

In truth, it will do the exact opposite. The State Attorney General will have to uphold a domestic partnership law. Yes, gays will be protected by the law and will be treated as a special class.

This will help the attorney of the three couples in his arguments for same-sex marriage.

We could easily end up with both domestic partnership and same-sex marriage laws.

If this happens, Hawaii will not go unpunished by God. Homosexual men and lesbian women will flock to Hawaii to marry and go back to their home states and countries, demanding that their marriages be recognized. What Hawaii does now could have an adverse affect on the whole nation and the whole world. I know, then, that God will not treat us lightly. Our island paradise will have become the Sodom and Gomorrah of the world.

Testimony By  
Daniel P. McGivern  
on October 25, 1995

When a person appears before a legislative body or a commission, it is expected that the members on the body are at least interested in what will be said. But this commission really isn't.

If 1,000 people testified against same-sex marriage and against domestic partnership laws, and only one person testified in favor, that person would have his or her view upheld by this commission.

This commission is not objective. It is a sham, a shibai, a fraud perpetrated on the public. The outcome of the commission's voting on whether marital benefits should be extended to homosexual and lesbian couples has been known since the commission was first appointed.

The real purpose of this commission is to hand a favorable report to the legislature, leading to a domestic partnership law in the next legislative session.

However, a domestic partnership law, which recognizes gays as a special class, will inevitably lead to same-sex marriage.

It is sad that this commission does not truly represent the community. This is the first time I've ever appeared before a body, knowing that what I and others have to say makes no difference.

If anything is said that is contrary to furthering the homosexual-lesbian agenda, it will be disregarded by the majority of this commission.



Two Quaker testimonies recently received by commissioner Bob Stauffer for forwarding.

#1:

The following minute [i.e., policy statement] was approved by Pacific Yearly Meeting [the regional organization of Quakers including California, Hawaii, and some other areas, including Mexico City] on Eighth-Month 4, 1995.

**"A Loving Response to Hostility Against Sexual Minorities"**

### **Background**

Within the territory comprising our Yearly Meeting there are Friends [i.e., Quakers] and others who risk hostility, verbal abuse and physical violence because they are, or are perceived to be, members of sexual minorities (for example, lesbians, gays, bisexuals). There are growing campaigns to legalize discrimination based on sexual orientation.

All hostility separates us from God and from each other. As Friends, we seek a response that arises from the Light, and reaches out and cares for the needs and human dignity of those affected on all sides of this conflict.

### **Action Minute**

Pacific Yearly Meeting of the Religious Society of Friends endorses all nonviolent efforts to establish and protect the civil rights of all persons despite their sexual orientation. We oppose all legislation or policy which disparages sexual minorities or abridges their basic constitutional rights.

#2:

The following minute was approved at Friends for Lesbian & Gay Concerns on Seventh-Month 6, 1995.

It is fundamental to Friends' faith and practice that we affirm the equality and integrity of all human beings. Equally, we hold that the purpose of recognizing and affirming committed relationships is to strengthen our families and communities.

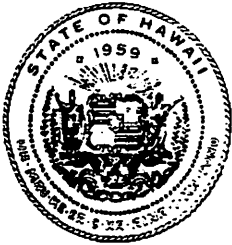
Therefore, it is our belief that it is consistent with Friends' historical faith and testimonies that we practice a single standard of treatment for all committed relationships.

Given that the State offers legal recognition to opposite-gender marriage and extends significant privileges to couples who legally marry, we believe that a commitment to equality requires that same-gender couples be granted the same rights and privileges.

Therefore, we believe that the State should permit gay and lesbian couples to marry and share fully and equally in the rights and responsibilities of marriage.

We invite Monthly Meetings [i.e., individual congregations], Yearly Meetings [i.e., regional divisions] and Quaker Organizations to consider a minute of support for legal recognition of same-gender marriages, and to communicate this support to their elected representatives.

Because of pending legislation and litigation, we urge a timely response.



**Commission on Sexual Orientation and the Law**  
**Legislative Reference Bureau**  
**State Capitol, Room 446**  
**Honolulu, HI 96813**

**Phone: (808) 587-0666      Facsimile: (808) 587-0681**

*Thomas P. Gill, Chairperson*  
*Lloyd James Hochberg, Jr.*  
*Robert H. Stauffer*

*Morgan Britt*  
*Nanci Kreidman*

*L. Ku'umeaaloha Gomes*  
*Marie A. "Toni" Sheldon*

**MINUTES OF THE MEETING HELD ON**  
**WEDNESDAY, NOVEMBER 22, 1995**  
**(Which Continued to November 29, 1995,**  
**December 4, 1995 and December 6, 1995 and**  
**Approved at January 4, 1996 Meeting)**

**I. Call to Order**

The sixth meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:15 a.m., at the State Capitol, Room 329. 415 S. Beretania Street, Honolulu. Members present were:

Thomas P. Gill, Chairperson  
Morgan Britt  
L. Ku'umeaaloha Gomes  
Lloyd James Hochberg, Jr.

Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

The materials that were handed out were as follows:

1. Draft final report dated November 22
2. Press release (Attached as Attachment 1.)
3. Library distribution list (Attached as Attachment 2.)

LRB staff also informed the Commission that the minutes have not been completely drafted. The Chair suggested that the minutes be put off until November 29, 1995. Mr. Britt moved to put off approval of the minutes to the end of the agenda. Ms. Kreidman seconded the motion.

Mr. Hochberg and Ms. Sheldon objected to moving the approval of the minutes because without them there is no record to base the report on.

The motion to put off the approval of the minutes passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon abstaining.

**II. Discuss Contents of Amended Draft Report, Including Proposals to Add or Delete Material in the Report**

The Commission took up the business of reviewing the draft final report dated November 22, 1995. LRB staff requested that all comments and adjustments to this draft

need to be faxed to LRB by Monday morning at 9:00 a.m in order to mail out the November 27, 1995 version on a timely basis for public review.

The Commission reviewed the draft. On page vi of the Summary, Mr. Hochberg and Ms. Sheldon expressed objections to the phrase "philosophic and religious" differences of the minority. Ms. Sheldon commented that the minority's personal philosophic and religious positions were not discussed. Ms. Sheldon stated that for the record her objections to extending any benefits to same-sex couples are related to medical and psychological issues. Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer agreed to remove the phrase "philosophic and religious" from the draft.

Mr. Hochberg asked how the Chairperson felt about the minority not including suggested legislation in this draft. The Chair replied that was up to the minority. Mr. Hochberg was surprised to hear that there is a rebuttal. Mr. Hochberg believes it is a bizarre thing to do. Dr. Stauffer pointed out that usually there is no minority opinion presented at all. Ms. Kreidman confirmed that not including a minority opinion in the Commission report was her experience as well.

Mr. Hochberg wants all the letters between Commissioners attached as an Appendix.

Ms. Gomes moved to accept the November 22, 1995 draft report with the noted modifications accepted for public review. Mr. Britt seconded.

The motion passed with the Chairperson, Mr. Britt, Ms. Gomes, Ms. Kreidman, *Mr. Hochberg* and Dr. Stauffer voting aye, and *Ms. Sheldon* abstaining.

LRB staff asked that all modifications to the draft be on the hard copy, and not on disk.

The Chair commented that he would entertain a motion to recess until November 29, 1995, Wednesday 9:00 a.m. Mr. Britt moved to recess until November 29, 1995 at 9:00 a.m. Mr. Britt withdrew the motion when the Chair realized that there were members of the public who wanted to speak.

Ms. Rachelle Sebela, testified before the Commission. Her testimony was that extending benefits to same-sex couples would be expanding equal rights and that it would be more accurate to classify the rights being asked for as "special rights". This type of action would encourage other groups, like alcoholics and child pornographers to ask for rights. She recognized that there are legal considerations which the Commission sounds like they have to deal with. Ms. Sebela's testimony was that homosexuals are susceptible to disease and 30% of the criminals of child molestation are by homosexuals. On the agenda for gay and lesbian rights held in March was an item to include lowering the age of consent for homosexual sex. Their goal was achieved by lowering the age of consent to age 15. Ms. Kreidman clarified that the age of consent in Hawaii is 14 between heterosexuals. Ms. Sebela closed by commenting that she would like to see equal time for heterosexuals to describe their beliefs.

Mr. Bill Woods, also spoke and thanked the Commission for their work.

Mr. Martin Rice, read from the bible, John 10:10-12 and Ezekiel 49-50 *which he interprets* that the Sodom and Gomorrah story relates to greed and hostility.

Italicized material was amended at 1/4/96 meeting.

Having no more comments from the public, Mr. Britt moved to recess until November 29, 1995, 9:00 a.m. Ms. Kreidman seconded the motion. The motion passed unanimously.

**November 29, 1995**

The meeting re-convened at 9:15 a.m., November 29, 1995, in Room 325, State Capitol Building, 415 South Beretania Street. Present at the continuation was:

Thomas P. Gill, Chairperson  
Morgan Britt  
L. Ku'umeaaloha Gomes  
Lloyd James Hochberg, Jr.

Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

The agenda item to be discussed is the review of minutes of the October 11, 1995, October 25, 1995, November 8, 1995, but the October 25, 1995 minutes are so voluminous the Commission members have not had an opportunity to really review them. The Commission explored continuation dates to handle all these minutes. It was decided, all Commission members could meet Monday December 4, 3:00 p.m. The minority graciously moved their scheduled December 4, 2:00 p.m. meeting to 9:00 on Tuesday, December 5.

There is a regularly scheduled meeting for December 6 where public testimony will be taken. We should reserve December 7, if the public testimony takes up all the time. Several Commission members commented that an extension to Friday, December 8, would be difficult. It was agreed to finish the report by the December 7.

Ms. Sheldon clarified that modifications will be allowed to the draft report that was distributed to the public. The Chair confirmed that written comments made up to December 6 will be compiled by Staff and distributed on December 7 to the Commission.

Mr. Hochberg asked to have the public testimony compiled as to for and against. He asked LRB staff if it is common to include this information. LRB staff could not comment as she had no personal knowledge of any other commissions.

The Commission then returned to the consideration of the minutes of October 11, 1995. Staff reviewed the Suggested Incorporation of Amendments to Dr. Ghali's testimony. The Chair asked how Mr. Hochberg wanted to deal with this. Would he like to consider the review by LRB after listening to the tape? Dr. Stauffer commented that Chapter 92 does not require this. The Commission can just put the material in the minutes and add that Commissioner Hochberg who is supported by Ms. Sheldon would like this information inserted into the minutes but it is not approved by the majority of the Commissioners.

Mr. Hochberg stated that he does not have the additional material to present today. Dr. Stauffer suggested the Commission defer this item again. Dr. Stauffer restated the issues. The Commission agreed to recess and reconvene on December 4, 1995, at 3:00 p.m. to consider the minutes of the October 11, 1995, October 25, 1995, and November 8, 1995. The Commission agrees to make any suggested changes or amendments to the minutes in writing by Monday, December 4 at 10:00 and deliver them to Staff so they can be compiled. Staff promised to provide the rest of the minutes by the end of November 30, 1995.

Dr. Stauffer moves to recess until December 4, 1995, at 3:00 p.m. to consider the minutes of the meetings of October 11, October 25, and November 8, 1995. Mr. Britt seconded. Unanimously approved.

**December 4, 1995**

The meeting convened at 3:00 p.m. in Room 309, State Capitol, 415 S. Beretania St., Honolulu. Present at the meeting were:

Thomas P. Gill, Chairperson	Nanci Kreidman
Morgan Britt	Marie A. "Toni" Sheldon
L. Ku'umeaaloha Gomes	Robert H. Stauffer
Lloyd James Hochberg, Jr.	

The materials handed out at the beginning of the meeting were:

1. Letter dated November 21, 1995 from Arthur S. Leonard, Professor of Law, The New York Law School, to Dr. Arthur Wagner, of Princeton, NJ, forwarded to the Commission from Tom Coleman in a memo to Pamela Martin dated November 29, 1995. (Attached as Attachment 5.)
2. Letter dated November 20, 1995, from Robert J. Bidwell, M.D. to the Commission. (Attached as Attachment 6.)
3. Notice for December 7, 1995 and Memorandum to Public from Pamela Martin dated December 1, 1995. (Attached as Attachment 7.)
4. A summary of public response to date. (Attached as Attachment 8.)

The November 22, 1995 Meeting reconvened at 3:00 p.m in Room 309 in the State Capitol, 415 S. Beretania St., Honolulu. This is a continued meeting of the meeting noticed for November 22, 1995, and continued to November 29, 1995 and now to December 4, 1995, to consider and decide on the minutes of October 11, 1995, October 25, 1995, and November 8, 1995.

LRB Staff explained to the Commission that she had missed the deadline for filing the official notice of the meeting the Commission had scheduled for December 6, 1995. She has already filed a notice for a meeting December 7, 1995. The Attorney General's Office has advised her that no meeting can take place unless 2/3 of the Commission amend the agenda to continue this November 22, 1995 meeting to December 6, 1995 to accept public testimony. Dr. Stauffer moved to amend the agenda to allow for additional public comment on the draft final report on December 6, 1995 at 9:00 a.m. Ms. Sheldon seconded the motion.

The discussion on the motion included projections by several Commission members that there may be many members of the public in attendance to testify before the Commission. The schedule for any written final amendments to the report will be due that same day was reiterated.

The motion to amend the agenda of the November 22, 1995 meeting to allow for additional public comment at the continuation of this meeting on December 6, 1995, passed unanimously.

The Minutes of the October 11, 1995 Meeting will be reviewed and finalized to confirm that Mr. Hochberg's reservations have been addressed.

Mr. Hochberg had the following amendments:

On page 1, after "testimony of" add a colon to designate a list and add the credentials of Dan Kehoe, as clinical psychologist. Also add after "retired Professor..." current chancellor for graduate research at Western Washington University. The Commission had no objections to these changes.

On page 2, in the second paragraph delete "after" and change tense of "reviewing" to "having reviewed the tape;". This change applies throughout the minutes. The Commission had no objection to these changes.

Mr. Hochberg had no changes on page 3, page 4, and page 5.

On page 6, in Steve Michaels testimony, in the fourth paragraph down that starts. "Assuming all things are equal." Have it read ...single home.... ...variations: (colon) taking out "recognizing that there is". The Commission had no objection to these changes.

On page 7, at the last paragraph. Add the phrase "by the Attorney General" to the sentence that reads: Arguments are termed "by the Attorney General" to be homophobic. The Commission had no objections to these changes.

On page 8, where it states "Mr. Hochberg paraphrased the holding of the court when it relied on ... to "uphold" (instead of reject). The Commission had no objections to these changes.

In Dan Foley's testimony, add a sentence after " ideology" that reads: "Mr. Hochberg attributed Mr. Foley's contemporaneously taken message to mean that Dan Foley supported a religious exemption." It was agreed by the Commission to add "Dan Foley made it clear that no church or pastor would be required to perform a same-sex marriage."

Mr. Hochberg moved to add at the beginning of the paragraph starting "Dr. Kehoe stated..." "As a psychologist, Dr. Kehoe," There were objections and vote on the change did not pass with Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Mr. Britt, Ms. Gomes, and the Chairperson voting nay, Ms. Kreidman abstained.

Mr. Hochberg moved to add the citations of Dr. Kehoe's testimony. He then read a portion of the testimony citing studies, and a quote from the written testimony. "Social science data has shown.... to ten years of data" Ms. Sheldon seconded the motion. The Commission agreed that minutes could cite to the specific page in the testimony, as such: " Dr. Kehoe testified about the social science research of detrimental effects of homosexual parenting on children, see page T-25." The Commission had no objections to this later addition.

Ms. Gomes was excused at 4:15 p.m.

On pages 8-9, in the last paragraph. After "\$127 million, annually." Mr. Hochberg moved to add "Several years are needed to study the issue." Ms. Sheldon seconded the motion. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

At the top of page 9, at the end of the paragraph. Mr. Hochberg moved to add to Dr. La Croix's testimony that "He could not state what the costs might total." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

Also on page 9, at the paragraph starting "The issue of "tipping"..." add the quoted phrase so the end of the sentence reads: causes others to leave or not appear is "difficult to gauge but seems unlikely to be" insignificant. Ms. Sheldon seconded the motion. Ms. Kreidman pointed out that the modification completely says the opposite of the statement as currently written. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

The Chair asked Mr. Hochberg how much more amendments he had and how much more time needed to be allotted to this task.? Mr. Hochberg replied by stating that he wants to move to add that Dr. La Croix said there are no studies regarding "tipping." Ms. Sheldon seconded. Dr. Stauffer spoke against putting words in Dr. La Croix's mouth and the written testimony of Dr. La Croix and Dr. Mak is attached. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

In between the third and fourth full paragraphs Mr. Hochberg moved to add " Dr. La Croix could not say that same-sex marriage in Hawaii would result in a net increase in tourism or revenue." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

Mr. Hochberg said he would also like to add in front of the fourth full paragraph: "Dr. La Croix admitted that his numbers were unreliable." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

On pages 9 and 10 is the issue of Dr. Ghali's testimony. The Chairperson reviewed the documents the Commission members should have with regard to this testimony. Mr. Hochberg presented a three page "Partial List of Requested Changes to Minutes of October 11, 1995 Commission Meeting" (Attached as Attachment 3 to the minutes of this meeting.) and LRB staff prepared a six page "Suggested Incorporation of Amendment to Dr. Ghali's Testimony." (*Attached as Attachment 4 to these minutes.*)

Dr. Stauffer moved to adopt the version of Dr. Ghali's testimony as rewritten by LRB Ms. Kreidman seconded the motion.

Mr. Hochberg moved to amend the LRB draft in the last paragraph's second sentence to change "did" not to "could" not. Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

Mr. Hochberg also moved to amend the LRB draft to change in the middle of the paragraph the words "may be" to "are" in the sentence "He stated the numbers may be unreliable..." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

*Italicized material was amended at 1/4/96 meeting.*



Mr. Hochberg moved to add to the end of the final paragraph: "Mr. Hochberg asked Dr. La Croix if it was true that Dr. La Croix could not opine that Hawaii would benefit from same-sex marriage tourism because Dr. La Croix did not know what the net effect of same-sex marriage would have on our overall tourism. Dr. La Croix stated "My figures are unreliable."" Ms. Sheldon seconded the motion. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and The Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

A vote taken to accept LRB draft of Dr. Ghali's testimony does not pass with Mr. Britt, Dr. Stauffer and the Chairperson voting aye, Ms. Sheldon voting nay and Ms. Kreidman and Mr. Hochberg abstaining.

LRB explained this vote does not pass because a majority of four is needed to pass a motion. Another vote was taken and the motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon, Dr. Stauffer and the Chairperson voting aye. Ms. Kreidman abstained.

On page 10, Mr. Hochberg pointed to the paragraph that starts "Robert Aitken..." and moved to add "Mr. Aitken stated that he has never been asked to perform a same-sex marriage." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and the Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

Ms. Sheldon asked the Commission members who voted against the motion why they would vote against it if they knew that he said it. Mr. Britt responded that it's a distortion of the truth, and Dr. Stauffer added that he believes Mr. Aitken said he would perform a marriage to any two loving people, but had not been asked by any gay or lesbian couples. Ms. Kreidman clarified that they are not voting against what he said just that it's irrelevant to include in the minutes. Mr. Hochberg stated that the state law requires that if something occurs and it's proposed to be in the minutes then it's supposed to be in the minutes. LRB disagreed with this interpretation.

Mr. Britt moved to amend the minutes to spell Mr. Aitken's name correctly, with a "t" and "Sangha" not "sengha." The Commission did not object to this amendment.

Mr. Britt moved to amend, the Diana Pau U paragraph to change "homosexual" to "gay and lesbian" and change "heterosexual" to "opposite-sex marriages." Mr. Hochberg spoke against the motion because they are neutral scientific terms. Mr. Britt disagreed, stating that "homosexual" is a clinical term, and "gay and lesbian" are the social words to use. LRB stated that Mr. Aitken had used the term "gay and lesbian." The motion passed with Mr. Britt, Dr. Stauffer and the Chairperson voting aye and Mr. Hochberg, Ms. Sheldon voting nay. Ms. Kreidman abstained.

Mr. Britt moved to capitalize title of Sister Chatfield at the bottom of page 10. No objection by the Commission.

On page 11, at the paragraph starting Reverend Joris Watland, add "a" in front of "director of the local ACLU" in the first sentence. There were no objections.

On page 12, Mr. Hochberg asked to add to the first sentence of the paragraph starting "Bishop Richard Lipka..." "and a licensed clinical social worker in Maryland" and also add at the end of the paragraph "He agreed with Dr. Kehoe's testimony and incorporated it by reference into his own." Ms. Sheldon seconded. The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

The last paragraph on page 12, on the second line insert after (2) "According to the traditional Christian interpretation of scripture, yesterday's modern politically correct interpretations are incorrect and therefore" Ms. Sheldon seconded. The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

Mr. Hochberg then moved to add just before (2) on the second to last line on page 12, "There is no accepted scientific study saying that homosexuality is biological and no serious scientist suggests a genetic basis for homosexuality." Ms. Sheldon seconded the motion. The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

Mr. Hochberg moved to have faulty assumption (2) amended to read: "(2) Homosexuals cannot change. After 16 years of personal counseling experience in hundreds of people's ability to change and cited a 1985 APA meeting report citing religious motivated change from homosexuality." The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

Mr. Hochberg also wanted to amend the third faulty assumption by adding "Love is not the same as kindness, addicts are not the subject of the addiction." Ms. Sheldon seconded the motion. The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

Mr. Britt clarified that his agreement is based on moving the meeting along. Dr. Stauffer clarified that his agreement on the testimony of Bishop Lipka is based on the fact that there is no written testimony.

Mr. Hochberg then moved on to the paragraph starting "Mike Gabbard..." Mr. Hochberg moved to add to the end of the paragraph: "Mr. Gabbard cited from homosexuality activist Dennis Altman's instruction to shift the debate from behavior to identity." Ms. Sheldon seconded the motion. The motion does not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Dr. Stauffer and the Chair voting nay and Ms. Kreidman abstaining.

Mr. Hochberg moved to amend the last sentence of the paragraph starting "Examining the ..." to read: "This would increase health care costs fifteen to twenty percent." Ms. Sheldon seconded. The motion passed with Mr. Britt, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Kreidman abstaining.

Mr. Hochberg would like to add a sentence on page 13, between "Examining..." and "Mike Gabbard suggests..." that reads: "Domestic partnership if not limited to just homosexuals couples the cost would be astronomical. All college students and state workers could be become domestic partners." Ms. Sheldon seconded. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and the Chairperson, Mr. Britt, and Dr. Stauffer voting nay, Ms. Kreidman abstained.

The word "marriage" needs to be inserted in the same paragraph after "evidenced by the fact that common law "marriage"..." No objection by the Commission was made to this amendment.

A discussion on the terminology used regarding the term "homosexual" in Mr. Gabbard's testimony included the LRB staff commenting that the minutes tried to reflect the terms the testifier used. Mr. Britt clarified that to have a homosexual couple is impossible

because homosexual is a clinical term used to describe a behavior and the term gay and lesbian couple refers to the social condition that this Commission is discussing.

Mr. Hochberg addressed Reverend Boaz's testimony. He moved to have the number of members of Evangelicals across the country amended from 15 million to 50 million. All the other commissioners disagreed, they heard and had 15 million in their notes. Mr. Hochberg withdrew the motion.

On page 14, add to Mary Woodard's testimony that her organization has "6 chapters on Oahu" There were no objections to this amendment.

On page 15, Mr. Hochberg stated that he would like to have the fact that Ms. Johnson's testimony was interrupted by adding "After Ms. Johnson read the word "feces" in her testimony, Mr. Britt interrupted Ms. Johnson to express that in his opinion her testimony was not germane to the topic and she had gone beyond the time limit. The Chair asked Ms. Johnson to summarize and she did." Everyone agreed to this amendment.

In the third full paragraph, on page 15, the correct spelling of the name is Paul Kamanu not Kamaro. Mr. Hochberg also wanted to add "He invited the Commissioners to discuss the topic on his radio station." There was no objection.

Mr. Hochberg requested adding "retired teacher" to Ms. Whiteman's credentials, after expert taxpayer. There was no objection.

Mr. Hochberg stated that after the recess on page 16, he renewed his motion to define major legal and economic benefit. This needs to be added to the minutes. The following paragraph will be added:

"Mr. Hochberg renewed his motion to define major legal and economic benefit. Ms. Sheldon seconded the motion. During discussion of this motion three definitions were identified. Dr. Stauffer stated there was a definition in his memos, the Act 217 Commission had adopted a definition and Mr. Hochberg was suggesting a third definition. Mr. Hochberg urged the Commission to adopt at least one of the definitions and so all the Commissioners could go about preparing for the next meeting with the same definition. The motion failed to pass with Mr. Hochberg, Ms. Sheldon, voting aye, and, Mr. Britt, Ms. Gomes, and Dr. Stauffer voting nay."

No other amendments or changes to the Minutes of the October 11, 1995 Meeting were heard and as such are adopted as amended.

At 5:32 the Chair reviewed the schedule. Subcommittee meetings will happen on December 5, and then on December 6, there will be the last opportunity to hear public testimony. Public testimony on December 6 will be handled on a first-come first-serve basis.

A discussion concerning the length of the minority portion of the report and changes that could be made ensued. Mr. Chair asked what was the purpose of distributing the report to the public if it were to be changed, it was not the Commission's intent to fool the public. Mr. Hochberg stated that nobody had the authority to limit the minority report.

A motion to recess until December 6, 1995, was seconded and unanimously passed.

December 6, 1995

A continuation of November 22, 1995 by motion made at December 4, 1995 to hear public testimony on the draft report released November 27, 1995.

Members present at the meeting:

Thomas P. Gill, Chair  
Morgan Britt  
Ku'umeaaloha Gomes  
Lloyd James Hochberg

Nanci Kreidman  
Marie "Toni" Sheldon  
Robert H. Stauffer

The meeting was reconvened at 9:15 a.m. in Room 312, State Capitol, 415 S. Beretania St., Honolulu.

Bananas were provided as refreshments.

Public testimony was on a first come, first serve basis. Due to the numbers waiting testimony was limited to two minutes. The Chair reminded the public to be polite as there are people in this room that do not agree with each other. Ms. Gomes acted as the timer and called the testifiers as they signed up. The Chair asked the public to address their comments and considerations to the draft report.

The following people addressed the Commission. Each testimony was recorded with regard to whether it supported the Commission findings or opposed the Commission's findings and if written testimony was included.

Amy Agbayani, Chairperson, Civil Rights Commission, supports the Commission's work, submitted written testimony; Donna Bryant, Steering Committee member of the Hawaii Equal Rights Marriage Project, supports the Commission's work, submitted written testimony by fax earlier; Tracey Bennett, supports the Commission's work, submitted written testimony by fax earlier; Sue Reardon, Co-director of the Hawaii Equal Rights Marriage Project supports the Commission's work, submitted written testimony by fax earlier see Donna Bryant above; Tom Ramsey, supports the Commission's work, submitted written testimony by mail; Barbara Chung, voter, consumer, and homeless due to cuts in human services objects to the Commission's work, submitted written testimony.

Mr. Britt reminded everyone of the time limits, as Ms. Chung ran over.

Public testimony continued with: Julian Johnson, objects to the Commission's work, submitted written testimony previously by mail; Rose Gibril Pires, objects to the Commission's work; Charles Woodard, Evangelist, objects to the Commission's work, submitted written testimony; David Bittner, objects to the Commission's work; Rick Nelson, born and raised in Utah, but represents only himself, objects to the Commission's work; Linda Borgia, objects to the Commission's work, submitted written testimony; Johnathan Borgia, 14 years old, objects to the Commission's work, submitted written testimony; Vanessa Y. Chong, Coalition for Equality and Diversity, through the American Civil Liberties Union executive director, supports the Commission's work, submitted written testimony by fax and at the meeting;

Ms. Sheldon noted that Thomas P. Gill listed as a director of ACLU is the same as the Chair. The Chair confirmed the same.

Public testimony continued with Lisa Poulos, citizen, objects to the Commission's work, submitted written testimony by fax and at the meeting; Charles McCrone, objects the Commission's work, submitted written testimony; Enric Ortiz, was called but did not respond; June Shimokawa, American Friends Service Committee, supports the Commission's work, submitted written testimony.

Nanci Kreidman was excused at 9:52 a.m.

Public testimony continued with Claudio Borge, Jr., parent, grandfather, took off from work, represents the King, Jesus Christ, objects to the Commission's work; Ron Arnold, objects to the Commission's work, submitted written testimony by fax earlier; Bill Woods, GLEA Foundation and Gay Marriage Project, supports the Commission's work, submitted his written notes at meeting.

Nanci Kreidman returned at 10:00 a.m.

Public testimony continued with Calvin N. Takara, objects to the Commission's work, submitted written testimony at the meeting; Tom Conlon, objects to the Commission's work, submitted written testimony; Martin Rice, resident of Kauai, supports the Commission's work, submitted written testimony by fax previously; Lora Burbage, life-long resident, mother of four and hairdresser, objects to the Commission's work, submitted written testimony; David Mitchell, objects to the Commission's work, submitted written testimony earlier by fax; Dawn V. Underwood, a Christian, mother and a resident objects to the Commission's work, submitted written testimony at the meeting; Reverend Father Norman T. Wesley, and his congregation and 300 churches of the Episcopal/Angelical Church objects to the Commission's work, submitted written testimony; Marc Breida, born gay, University employee, supports the Commission's work submitted written testimony by mail; Jeff Cadavona, a local born Waipahu, Damien graduate, disabled veteran, supports the Commission's work, submitted written testimony earlier by fax/mail; Robert Gibson, represents himself, his wife, kids and grandchildren, objects to the Commission's work, submitted written testimony earlier by mail or fax; James Staskhoosa was called and did not answer; Wayne Akana, supports the Commission's work, submitted written testimony at the meeting; James F. Cartwright, born a Latter-day Saint (five generations), supports the Commission's work, submitted written testimony by mail; Ms. Napoleon was called and did not answer; Susan Brown, teacher of 5th grade class, objects the Commission's work, submitted written testimony by fax earlier; Reverend Mike Young, minister of the First Unitarian Church in Honolulu who has been marrying gay and lesbian couples for twenty years, supports the Commission's work, submitted written testimony earlier by fax/mail; John A. Hoag, resident of 30 years, parent and grandparent, recent Chair of Salary Commission objects to the Commission's work, submitted written testimony at the meeting; Ken Gibson, objects the Commission's work, will submit written testimony soon by fax; Isaah Lumboa, representing Gospel Temple, objects to the Commission's work; Elizabeth Lover, objects to the Commission's work; Reverend Tony Bacungua, Full Gospel Temple, objects to the Commission's work, submitted written testimony; Joe Ahuna, born and raised in Hawaii, opposes the Commission's work, will submit written testimony soon by fax; Sam Langi, objects to the Commission's work, submitted written testimony at the meeting; Leon Siu, State Director of Christian Voice of Hawaii, objects to the Commission's work, submitted written testimony at meeting; Jeff Grey, from Maui, objects to the Commission's work, submitted written testimony at the meeting;

Nanci Kreidman was excused at 10:55 a.m.

Public testimony continued with Amanda Dupont, mother, grandmother, and resident, objects to the Commission's work, will submit written testimony after the meeting; Elizabeth Vellalos, objects to the Commission's work, submitted written testimony at the meeting; Tiger Mosier, objects to the Commission's work, will submit written testimony at a later time; Diane Mosier, objects to the Commission's work, submit written testimony in the future.

Nanci Kreidman returned at 11:05 a.m.

Public testimony continued David Smith, Kamehameha graduate and victim of child abuse objects to the Commission's work, will submit written testimony in the future;

Nanci Kreidman was excused at 11:10 a.m.

Public testimony continued with Karen Smith, wife of David, mother of four natural children and other foster children, and Christian objects to the Commission's work; Don Fernandes, objects to the Commission's work, submitted written testimony by fax earlier and at meeting; Nancy Greenwood, objects to the Commission's work, submitted written testimony by fax earlier; Alan Jones was called but did not answer; Melodie Ascentia and her teacher from Aiea High School, objects to the Commission's work, will submit written testimony later; Sarah Banks, daughter of Julie and Paul Banks, and a director of Gay Marriage Project, she read her parents testimony and supports the Commission's work; Skip Burns, from the Big Island, supports to the Commission's work, submitted written testimony previous to the meeting; Troy Freitas, born and raised in Hawaii, Kalaheo graduate, and teacher on the windward side, objects to the Commission's work. His class 12% are for marriage, 11% don't care and 76% are against his class; Peggy Y. Yorita supports the Commission's work, submitted written testimony at the meeting; Rasika Gleason, 19 years old, volunteer Common Sense Now, objects to the Commission's work, submitted written testimony at the meeting;

Morgan Britt was excused at 11:25 a.m.

Public testimony continued with Delpia Akiu, mother, grandmother, resident and concerned citizen, objects to the Commission's work;

Morgan Britt returned at 11:30 a.m.

Public testimony continued and Ken Burbert was called but did not answer; Mike Gabbard, President of Stop Promoting Homosexuality America, objects to the Commission's work, submitted testimony in writing at the meeting;

Nanci Kreidman returned at 11:35 a.m.

Public testimony continued with Dan Ditto, parent of six children, objects to the Commission's work; Harvey Alisa, born and raised, objects to the Commission's work; Dave Centofanti was called and did not answer; Don Harriman, objects to the Commission's work; Philip Smith, Ph.D. in Sociology, studies in social institutions, from Stanford, objects to the Commission's work; Dale Hammond, 30-year resident of Hawaii, objects to the Commission's work; Don Baldwin, Jr., born in Maui, Oahu resident, objects to the Commission's work;

Ku'umeaaloha Gomes was excused at 11:50 a.m.

Public testimony continued with Dora Baldwin, Oahu resident, objects to the Commission's work;

Ku'umeaaloha Gomes returned at 11:53 am.

Public testimony continued with Gracie Hemenway, a Hawaiian, objects to the Commission's work; Dennis Mau, former teacher, objects to the Commission's work; Matte Teo, objects to the Commission's work, submitted written testimony at the meeting; Shane Cullen, objects to the Commission's work.

The Commission took a recess at 12:05 they reconvened at 12:15

Daryl Gerloff objects to the Commission's work, submitted written testimony at meeting; Bette Gerloff objects to the Commission's work, submitted written testimony at meeting.

The Chair polled the Commission to see if the Commission should take a break, or keep going. Ms. Sheldon, Mr. Hochberg, Mr. Britt, Mr. Stauffer and Ms. Gomes agreed to keep going.

Public testimony continued with Michelle Umaki, First Assembly of God, over 800 signatures, objects to the Commission's work; Ward Stewart, supports the Commission's work, and has submitted written testimony earlier by mail and handed in his statement today; Bonnie Warring, objects to the Commission's work; Mr. Hirato was called and did not answer; Skip McQueen, objects to the Commission's work; Rose Freitas was called and did not answer; R.K. Lau, objects to the Commission's work; Margaret Talamantes, as a dancer, objects to the Commission's work; Earl Higa was called and did not respond; Cherry Patterson, objects to the Commission's work submitted written testimony; Lori DeLuca, objects to the Commission's work.

Dr. Stauffer was excused at 12:35 a.m.

Mr. Britt asked Ms. DeLuca to wrap it up.

Public testimony continued with Carl Vannoh, Jr., pastor, teacher, missionary evangelist, husband, objects to the Commission's work; Jan Judd was called and did not respond; Pumehana Cobb-Adams objects to the Commission's work; April English, raised in Ohio, born again Christian 3 years ago, objects to the Commission's work; Patrick Battista, and his partner who is a State analyst, supports the Commission's work, submitted his testimony previously by fax/mail; Rodney Aiu, born and raised in Hawaii, objects to the Commission's work; Mike Stengle was called and did not respond; Kathleen Home Smith was called and did not respond;

Nanci Kreidman was excused at 12:55 a.m.

Public testimony continued with Chuck Brocka, Baptist pastor with lesbian niece, objects to the Commission's work; Indish Schnieder was called and did not respond (he submitted written testimony, see below); Rori Fujimoto was called and did not respond; Lori Fujimoto was called and did not respond; Vernon Taa, father, husband, and grandfather, objects to the Commission's work submitted his testimony earlier by fax/mail; John Kinyon, Protestant minister and former attorney, objects to the Commission's work, submitted written testimony; Scott VanInwagen, objects to the Commission's work submitted a copy of his faxed testimony; Kalei Puha, supports the Commission's work; Noela Napoleon, supports the Commission's work.

Ms. Napoleon said upon her inquiry the Sergeant of Arms said that the room assigned to the Commission today is room LRB ordered and they were trying to relocate us.

Public testimony continued with Navahine Dudoitt, a lesbian mother, supports the Commission's work; Stratton Goodhugh, objects to the Commission's work; Debbi Hartman, former chair of the Board of Education, objects to the Commission's work both the majority and the minority, submitted written testimony at the meeting; Enric Ortiz, objects to the Commission's work;

Ms. Sheldon wanted to registered that she did not approve of The Chair's behavior and considered it rude.

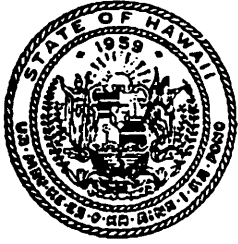
Public testimony continued with Lori K. Fujimoto, objects to the Commission's work, she submitted written testimony.

No other members of the public wished to speak, although the following written testimony was submitted on December 6, in lieu of oral testimony, received from: 102 people on petitions from Kauai submitted and dated December 4, 1995, in opposition to the Commission's work; Maryann and Simi Mapu object to the Commission's work; Mitzi and Gordon Ledingham, support the Commission's work; Barbara Ruth Bishop, objects to the Commission's work; Bradley Scully, resident objects to the Commission's work; Terry Nakamura objects to the Commission's work; L.M. Indy Schneider, L. Ac. objects to the Commission's work.

### **III. Adjournment**

Having no other business a motion was made, seconded and unanimously passed to adjourn. The meeting was adjourned 1:30 p.m.





**THE COMMISSION ON  
SEXUAL ORIENTATION AND THE LAW**

c/o Legislative Reference Bureau  
State Capitol, Room 446  
Honolulu, Hawaii 96813  
Telephone: 587-0666  
Facsimile: 587-0681

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**NEWS RELEASE**

Contact: Pamela Martin  
Phone: 587-0666

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Thursday, November 27, 1995

**The Commission on Sexual Orientation and the Law releases a draft of their final report for public review and comment and will be available at selected libraries throughout the State.**

The Commission on Sexual Orientation and the Law has released a draft of their final report to the Legislature. The report will be available for review at the Hawaii Documents Section at selected public libraries across the State. The Commission invites members of the public to review and comment on the draft. Any written testimony can be mailed to the Commission c/o the Legislative Reference Bureau, State Capitol, Room 446, Honolulu, Hawaii 96813, or received by fax to 587-0681. A meeting of the Commission will be held on Wednesday, December 6, 1995, at 9:00 a.m. to consider comments and make final adjustments to the draft. Members of the public may appear in person to give oral testimony at the December 6, 1995 meeting.

The draft report will be available at the following public libraries:

On Oahu at the Main Library, King Street, Honolulu; Aiea Public Library; Wahiawa Public Library; Waianae Public Library; Hawaii Kai Public Library. On Maui in the Wailuku Public Library, Kihei Public Library and Hana Public & School Library. On Kauai at the Lihue Public Library and Kapaa Public Library. On the Big Island at the Hilo Public Library, Kailua-Kona Public Library, and the Pahoa Public & School Library. The draft will also be available for review at the Molokai Public Library and Lanai Public Library..

**LIBRARY DISTRIBUTION LIST**  
**DRAFT REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW**  
**TO BE MAILED ON NOVEMBER 27, 1995**

**1. Hawaii State Public Library**

Mr. Patrick McNally  
Librarian-Hawaii Documents Center Unit  
478 South King Street  
Honolulu, Hawaii 96813

**East Oahu Library District:**

**2. Hawaii Kai Public Library**

249 Lunalilo Home Road  
Honolulu, Hawaii 96825

**2a. Kailua Public Library**

239 Kuulei Rd  
Kailua, HI 96731

**3. Kaneohe Public Library**

45-829 Kamehameha Hwy.  
Kaneohe, HI 96744

**West Oahu Library District:**

**4. Aiea Public Library**

99-143 Moanalua Rd.  
Aiea, Hawaii 96701

**5. Wahiawa Public Library**

820 Californai Ave.  
Wahiawa, Hawaii 96786

**6. Waianae Public Library**

85-625 Farrington Highway  
Waianae, HI 96792

**6a. Waialua Public Library**

67-068 Kealohanui St.  
Waialua, HI 96791

**Big Island Library District:**

**7. Hilo Public Library**

300 Waianuenue Ave.  
Hilo, HI 96720

**8. Kailua-Kona Public Library**

75-138 Hualalai Road.  
Kailua-Kona, HI 96740

**9. Paho Public & School Library**

P.O. Box 16  
Paho, HI 96778

**9a. Honokaa Public Library**

P.O. Box 236  
Honokaa, HI 96727

**Kauai Library District:**

**10. Lihue Public Library**

4344 Hardy Street  
Lihue, HI 96766

**11. Kapaa Public Library**

1464 Kuhio Highway  
Kapaa, HI 96746

**Maui Library District:**

**12. Wailuku Public Library**

251 High Street  
Wailuku, HI 96793

**13. Hana Public & School Library**

P.O. Box 490  
Hana, HI 96713

**14. Kihei Public Library**

131 South Kihei Road  
Kihei, HI 96753

**15. Molokai Public Library**

P.O. Box 395  
Molokai, HI 96748

**16. Lanai Public & School Library**

P.O. Box A-149  
Lanai City, HI 96763

**20. Kahului Public Library**

90 School Street  
Kahului, HI 96753

Partial List of Requested Changes to Minutes  
of October 11, 1995 Commission Meeting

Moheb Ghali, one of the economists who testified before the Commission, explained 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. Where an expected value of some benefit might be worth \$500 to a person who actually takes advantage of the benefit, if the probability of someone taking advantage of the benefit is say 1 in a 1000 chance, the expected value of that benefit is only \$0.50 ( $\$500 \times .001$ ). The probability of use of a particular benefit is further reduced where the benefit requires special status before it becomes available to the general public. 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 to the ratio of the number of U.H. professors to the population at large.

Dr. Ghali also explained that most of the benefits addressed by Dr. La Croix, the other economist who testified at the commission, concern estate planning techniques or contract rights 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 in stationary stores, trusts, durable powers of attorney, living wills and other contracts are the remedies available to all unmarried people without regard to their sexual orientation. In Dr. Ghali's opinion, the data or measurement of the value of these small benefits (saving the cost of these widely used remedial measures) is not warranted in light of the cost to do the research.

Dr. Ghali also clarified that the Employee Retirement System permits every member to designate anyone as the beneficiary: a spouse, domestic partner or anyone else. Thus by and large, there are not additional benefits to be realized in the ERS pension plan. The exception is an in-service death benefit in noncontributory plans which Dr. Ghali also as discussed.

Of the benefits listed in the LRB 15 page summary, Dr. La Croix identified only nine "[b]enefits from Marriage with a Significant Expected Value." Of those, Dr. Ghali testified that:

"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." (see page 2 of Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners".

However, Dr. Ghali agrees that three benefits addressed by Dr. La Croix merit investing the resources to research the economic value. Those benefits were: Retirement Health Insurance Benefits, Non Retirement Health Insurance, ERS Death Benefits, and Hawaiian Home Lands Leases. Dr. Ghali opined that none of the other benefits can possibly be large enough to bear the cost of the analysis needed to determine the economic value, and therefor do not constitute major legal or economic benefits.

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

Concerning the ERS Death Benefits, Dr. Ghali discussed Mr. Shimabukuro's testimony that the benefits payable upon the death in-service of an employee are only available to the surviving spouse (until remarried) and the dependent children (until 18 years old) if the employee was under the non contributory plan. The only benefit exclusive to spouses under the contributory plan is an additional pension. Dr. Ghali explained how to measure the economic value of this benefit:

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.

Concerning the Hawaiian Home Lands Lease issue, Dr. Ghali opined that the cost to 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 stated that data on the excess demand for Hawaiian Home Lands parcels be analyzed. The value of the Hawaiian Homes Land lease cannot be said to be a major benefit. Dr. Ghali suggested that:

To evaluate this potential benefit, one needs to know the frequency of domestic partnerships that occupy Hawaiian Homes Lands properties at this time. An opinion survey of Hawaiian community attitude towards granting the rights to domestic partners of Hawaiians in preference to there 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.

Dr. Ghali agreed with the prior testimony of Dr. La Croix and Professor Roth that the tax code both benefits and burdens married and unmarried couples depending on the taxable income rather than the marital status. Dr. Ghali also agreed that neither this commission nor the state legislature can modify the U.S. Internal Revenue Code. Therefore, there is no economic benefit to be gained from the IRC by creation of domestic partnerships which is not synonymous with marriage under the Code. Were domestic partners to actually marry, whether they benefit or are burdened depends on their relative incomes. Unless data show that most or all same-sex couples have greatly unequal income, Dr. Ghali agreed with Professor Roth and Dr. La Croix that there is no reason to assume a general tax benefit from marriage.

SUGGESTED INCORPORATION OF AMENDMENT TO DR. GHALI'S TESTIMONY

Key: **Bold**=original draft

Underline = LRB Staff additions

Regular type = Suggested additions by Mr. Hochberg

[ ] = LRB Staff suggesting be deleted.

Dr. Mohab Ghali, a retired professor of economics at the University of Hawaii who has studied the economy of Hawaii presented written credentials. He lives in Seattle and came to address both: (1) the major legal and economic benefits extended to married couples and not to same-sex couples; and (2) the substantial public policy to extend in part or total such benefits to same-sex couples.

Dr. Ghali contributed his book Tourism and Regional Growth (1977) to the Commission's library.

Dr. Ghali explained that he has reviewed the list of benefits submitted by Dr. La Croix and the testimony of Mr. Shimabukuro, of the Employment Retirement System. His testimony will assist the Commission by focusing on the benefits identified in those testimonies that should be pursued by the Commission. He believes only those benefits of value should be analyzed further because it costs time and money to do proper analysis.

Dr. Ghali stated that there is no such thing as just a free benefit to society. A benefit to one group, means a cost to others. As an economist his duty is to examine if the cost to society exceeds the benefit to society. In his analysis Dr. Ghali asks us to disregard all benefits with a "small expected value." It is important to determine the "expected value" of a benefit. The expected value then has to be discounted by the probability of someone taking advantage of the benefit. For example, small benefits like a tuition waiver to U.H. for my spouse has a probability of 1 in 1000 people taking advantage of it which would have an expected value of \$1.50 and discounted five years down the line would have a value of 96 cents. These type of benefits should be disregarded and are not considered in my analysis.

Commissioner Hochberg requested the following excerpt from Mr. Ghali's testimony be included in the minutes:

"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 value of these

benefits, I do not believe the magnitude of the benefits is sufficient to justify the cost of the data acquisition." (See page T-31, or page 2 of Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners").

With regard to one-time benefits of marriage, he clarified that he addresses these benefits to the extent he understands these laws, stating that he is not a lawyer, he is an economist. He stated that the only area where the state favors a spouse in this area is in the case where a spouse dies without a will. Benefits in the areas of wills were not considered in his testimony either as they are only benefits if a person dies without a will.

The employees retirement system (ERS) is not a large benefit except for the contributory system and the health benefits associated with it. He commented that the health insurance impact would cost \$2,000 per new eligible person. He summarized by saying that in the two classes of retirees, some of them do not confer any official benefits. The language uses designated beneficiary except for widows of the contributory system. But the contributory system ended in 1984 and now only a small group of people can participate in that system and therefore is of little value. Dr. Ghali also clarified that the Employee Retirement System permits every member to designate anyone as the beneficiary: a spouse, domestic partner or anyone else. Thus by and large, there are not additional benefits to be realized in the ERS pension plan. The exception is an in-service death benefit in non-contributory plans which Dr. Ghali also discussed. Mr. Hochberg requested the following excerpt on this point from the Dr. Ghali's written testimony (see page T-33 & 34) be included in the minutes:

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 unexpected value of the exclusive spouse pension under the contributory plan can be calculated to evaluate the potential benefit and cost of the policy change.

Dr. Ghali focused on health coverage as a serious issue in the "economies of family". From an economist's point of view families make divisions of work that are economically advantageous to them. One may stay at home to work inside the home if the family economy will allow it. The family health care advantage is a subsidy. A subsidy to one group is not good, extending a subsidy to two groups is not better, it is worse. If benefits are extended to domestic partners someone has to pay for both current family health subsidies and domestic partner health [those] subsidies. Concerning the [retirement] health insurance benefits, Dr. Ghali suggested that data be collected and analyzed to determine the economic value of the benefit.

Dr. Ghali agreed with the prior testimony of Dr. La Croix and Professor Roth that the tax code both benefits and burdens married and unmarried couples depending on the taxable income rather than the marital status. Dr. Ghali also agreed that neither this commission nor the state legislature can modify the U.S. Internal Revenue Code. Therefore, he would not spend money or effort in the study of the Social Security Administration and Tax Code. [there is no economic benefit to be gained from the IRC by creation of domestic partnerships which is not synonymous with marriage under the Code.] Were domestic partners to actually marry, whether they benefit or are burdened depends on their relative incomes. Unless data show that most or all same-sex couples have greatly unequal income, Dr. Ghali agreed with Professor Roth and Dr. La Croix that there is no reason to assume a general tax benefit from marriage.

Hawaiian Home Lands leases are the last category of benefits addressed by Dr. Ghali. Concerning the Hawaiian Home Lands Lease issue, Dr. Ghali opined that the cost to extending this benefit must be evaluated in the 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 stated that data on the excess of demand for Hawaiian Homes Lands parcels be analyzed. The value of the Hawaiian Homes Land Lease cannot be said to be a major benefit. Dr. Ghali [suggested] stated in his written testimony (see page T-34) that:

To evaluate this potential benefit, one needs to know the frequency of domestic partnerships that occupy Hawaiian Homes Lands properties at this time. An opinion survey of Hawaiian community attitude towards



granting the rights to domestic partners of Hawaiians in preference to other Hawaiian families would be helpful, as it will ultimately be the Hawaiian Homes Lands that will make the decision regarding the extension of this benefit to domestic partners.

Dr. Ghali then addressed the economic effect on tourism. He agreed with Dr. La Croix with regard to his statement that Jennifer Brown's figures in the Southern California Law Review article were unreliable, but he did not agree with Dr. La Croix's analysis either. He stated that Dr. La Croix's figures were as simple as Ms. Brown's. He submitted a diagram to the Commission that illustrated steps in a distribution model. The diagram highlighted the path taken by the Brown article, jumping from a starting point to a place in the middle of the diagram that indicated Ms. Brown had failed to complete the entire analysis as outlined in the diagram. The diagram considered such factors as tourist expenses, migration and state expenditures.

Dr. Ghali submitted written testimony on the major legal and economic benefits, a written commentary on the Brown article, and written testimony on the economic effects of same-sex marriage on tourism in Hawaii.

Mr. Hochberg asked Dr. La Croix if he could estimate a range of the upper and lower estimate numbers he spoke of in his testimony. Dr. La Croix did not. Mr. Hochberg tried to clarify if the overall net income to the economy is \$127 million. Dr. La Croix explained that the \$127 million is not a net figure, it does not include crowding out and other items. He stated the numbers may be unreliable because the State does not have an econometric model, but it is the conclusion of Dr. Mak and Dr. La Croix that "yes, there are net benefits to the Hawaii economy." Dr. Ghali did not agree there is a net benefit, stating that without the econometric model he could not say.

REMAINDER OF THE THE ORIGINAL PARTIAL LIST OF REQUESTED CHANGES TO MINUTES OF OCTOBER 11, 1995 COMMISSION MEETING that found either redundant or could find no reference either on tape or in the written testimony.

[Moheb Ghali, one of the economists who testified before the Commission, explained 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. Where an expected value of some benefit might be worth \$500 to a person who actually takes advantage of the benefit is say 1 in a 1000 chance, the expected value of that benefit is only \$.50 ( $\$500 \times .001$ ). The probability of use of a particular benefit is further reduced where the benefit requires special status before it becomes available to the general public. 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 to the ratio of the number of U.H. professors to the population at large.

Dr. Ghali also explained that most of the benefits addressed by Dr. La Croix, the other economist that testified at the commission, concern estate planning techniques or contract rights 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 in stationary stores, trusts, durable powers of attorney, living wills and other contracts are the remedies available to all unmarried people without regard to their sexual orientation. In Dr. Ghali's opinion, the data or measurement of the value of these small benefits (saving the cost of these widely used remedial measures) is not warranted in light of the cost to do the research.

[NOTE: MATERIAL WAS REMOVED AND INSERTED IN THE MINUTES]

Of the benefits listed in the LRB 15 page summary, Dr. La Croix identified only nine "benefits from Marriage with a Significant Expected Value." Of those, Dr. Ghali testified that:

[NOTE: MATERIAL WAS REMOVED AND INSERTED IN THE MINUTES]

However, Dr. Ghali agrees that three benefits addressed by Dr. La Croix merit investing the resources to research the economic value. Those benefits were: Retirement Health Insurance Benefits, Non Retirement Health Insurance, ERS Death Benefits, and Hawaiian Home Lands Leases. Dr. Ghali opined that none of

the other benefits can possibly be large enough to bear the cost of the analysis needed to determine the economic value, and therefore do not constitute major legal or economic benefits.

[NOTE: MATERIAL WAS REMOVED AND INSERTED ABOVE] The data needed should concern the average annual cost of spousal medical coverage and the estimate of the number of domestic partners expected to 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 suggested that data be collected and analyzed concerning the average annual cost of spousal medical coverage and the estimate of the number of domestic partners expected to benefit from non retirement health insurance. This information will reveal the magnitude of the subsidy. In addition, he suggested that the Commission analyze alternative ways of funding the health insurance coverage.

Concerning the ERS Death Benefits, Dr. Ghali discussed Mr. Shimabukuro's testimony that the benefits payable upon the death-in-service of an employee are only available to the surviving spouse (until remarried) and the dependent children (until 18 years old) if the employee was under the non contributory plan. The only benefit exclusive to the spouses under the contributory plan is an additional pension. Dr. Ghali explained how to measure the economic value of this benefit:

[NOTE: MATERIAL HAS BEEN REMOVED AND INSERTED IN THE MINUTES]

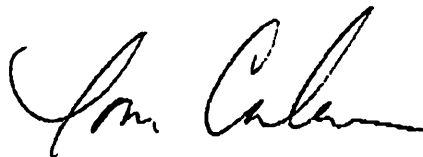
TO: Pam Martin  
FROM: Tom Coleman  
DATE: November 29, 1995

*3 pages*

I am enclosing a letter written by Professor Art Leonard in reaction to the written memo I submitted to the Commission. Tom Gill, or other members of the Commission, may be interested in seeing this.

I respect Professor Leonard very much. He has written a book on sexual orientation and the law, teaches classes on the subject, and has published many law review articles. For the past several years, he has been editor and publisher of the Lesbian and Gay Law Notes, a monthly newsletter that summarizes and analyzes legal and political developments (nationally and internationally) on gay rights and aids-related issues.

In any event, I look forward to seeing the draft of the Commission's report that is being circulated for public comment.



*Attachment 5*



The New York Law School 57 Worth Street, New York, New York 10013-2960

Arthur S. Leonard, Professor of Law  
212.431.2186 Fax: 212.431.1804

November 21, 1995

Dr. Arthur Warner  
18 Ober Road  
Princeton, NJ 08540

Dear Arthur,

Thank-you for sending me a copy of Tom Coleman's article, accompanying his testimony to the Hawaii commission. He makes a very persuasive argument that I think the Hawaii Supreme Court would have to consider carefully.

The issue, of course, is whether the remaining differences between marriage and "comprehensive" domestic partnership (i.e., that d.p. would only confer rights for purposes of state law while marriage would presumably purport to confer rights also with respect to federal law and the law of other jurisdictions, whether states or foreign countries) would be outweighed by the drawbacks for the state that he describes. One must remember the other significant ruling by the Hawaii Supreme Court in Baehr v. Lewin: that because the Hawaii constitution specifies "sex" in its equal protection provision, sex is a "suspect" classification. This means the state's reason for using a sex classification in defining eligibility for marriage must be "narrowly tailored to meet a compelling interest" of the state. The question is whether the state has a compelling interest in avoiding conflict with the federal government and other states over the recognition of Hawaii same-sex marriages for purposes of federal law or the law of other states, and whether this interest could only be achieved by excluding same-sex couples from marriage. Tom is correct in observing that the Hawaii court rejected the argument that same-sex marriage could be a fundamental right, but then held that this is still a "strict scrutiny" case because of the use of a sex-based classification.

I tend to agree with Tom that comprehensive domestic partnership (i.e., domestic partnerships that carries all the rights of marriage for purposes of state law) would really give the state supreme court pause in its equal protection decision, precisely because there is serious question whether any particular state should be attempting to affect national policies through its domestic relations laws. I also tend to agree with his implicit conclusion that a court victory for the same-sex marriage forces in Hawaii would be short-lived at best; the impetus to amend the Hawaii constitution to overrule the court would be great, the reaction in Congress would likely be immediate, and I think that those who think there will be many other states that will recognize Hawaii same-sex marriages are probably living in a fantasy world.

Back in the late 1980s, I was one of the vocal advocates within Lambda's civil rights roundtable for bringing marriage litigation. Now I am much less ardent on this score, since I am convinced that the marriage issue (like, probably, the military issue) can only be resolved in the realm of politics, not adjudication. Tom's article is very convincing on the equal protection issue, giving quite a bit of food for thought, particularly on the potential litigation into which the state of Hawaii may be drawn if same-sex marriage eventuates.

Thanks for sharing this with me.

Yours,



Arthur S. Leonard



# University of Hawai'i at Mānoa

John A. Burns School of Medicine  
Department of Pediatrics  
Kapiolani Medical Center for Women and Children  
1319 Punahou Street • Honolulu, Hawai'i 96826

November 20, 1995

Thomas P. Gill, Chairperson  
Commission on Sexual Orientation  
and the Law  
Legislative Reference Bureau  
State Capitol, Room 446  
Honolulu, HI 96813

Dear Mr. Chairperson:

I would like to briefly address the two matters that were raised during my testimony to the Commission on November 8, 1995 on the impact of same-sex parents on the development of children.

Ms. Sheldon had asked for information regarding what key words were used in the literature search conducted through Kapiolani Medical Center's library. I spoke with our librarian, Pam Shigezawa, who initiated the search and she said that for the "MedLine" search she used the keywords, "homosexuality" and "gay" cross-referenced with "parent/parenting" and "family". For the PsychLit" search she used the key word "homosexual parents". Pam said she would be happy to speak to any Commission members if they have further questions about the search.

Secondly, I asked to comment on the article "Homosexuality" by R. Friedman and J. Downey which appeared in the New England Journal of Medicine (Oct. 6, 1994). I consider it an accurate statement of what is now known about the nature and origins of sexual orientation and the experience of lesbian and gay individuals and families. It also demonstrates the appropriate role of advocacy within the medical profession and the scientific literature. I have used this article frequently in the past year in my teaching of medical students and pediatric residents at the University of Hawaii, John A. Burns School of Medicine. The New England Journal of Medicine is one of the most respected journals in the medical profession. I believe the article reflects mainstream thought within the medical profession on the issue of homosexuality.

*Attachment 6*

Thank you for the opportunity to address these two issues. Please let me know if you have any further matters you would like me to comment upon or help research for you.

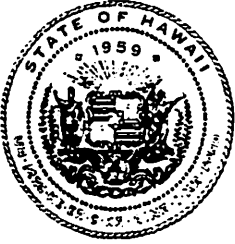
Respectfully yours,

A handwritten signature in black ink that reads "Robert J. Bidwell, M.D." The signature is written in a cursive style with a large, stylized initial 'R'.

Robert J. Bidwell, M.D.  
Associate Professor of Pediatrics  
Director of Adolescent Medicine  
University of Hawaii  
John A. Burns School of Medicine

RJB:clr





**Commission on Sexual Orientation and the Law**  
**Legislative Reference Bureau**  
**State Capitol, Room 446**  
**Honolulu, HI 96813**

**Phone: (808) 587-0666      Facsimile: (808) 587-0681**

---

*Thomas P. Gill, Chairperson*  
*Lloyd James Hochberg, Jr.*  
*Robert H. Stauffer*

*Morgan Britt*  
*Nanci Kreidman*

*L. Ku'umeaaloha Gomes*  
*Marie A. "Toni" Sheldon*

December 1, 1995

**MEMORANDUM**

**TO:**            Members of the Public

**FROM:**        Pamela Martin  
                  Staff to Commission on Sexual Orientation and the Law

**SUBJECT:**    Untimely Filing of Notice of December 6, 1995 Meeting

Please find attached the official notice of a meeting for the Commission on Sexual Orientation and the Law. You will notice the meeting date is for December 7, 1995.

**Please be aware there will be a meeting of the Commission on Sexual Orientation and the Law on December 6, 1995, at 9:00 a.m in Room 312, State Capitol, 415 S. Beretania Street.**

The Commission will hear comments from the public relating to the Draft Final Report at the December 6, 1995 meeting.

The Sunshine Law of Hawaii (Chapter 92, Hawaii Revised Statutes) requires the filing of a notice in the Lieutenant Governor's Office at least six days before the meeting. The Legislative Reference Bureau failed to file that notice for the Commission. Fortunately, the Commission is in recess of the November 22, 1995, meeting. The November 22, 1995, meeting will reconvene on December 4, 1995, at 3:00 p.m., for the approval of minutes. The Sunshine Law allows the Commissioners to amend the agenda if two-thirds of the Commissioners agree (see §92-7, Hawaii Revised Statutes). The Commissioners feel that the media has given actual notice to the public about the December 6 meeting so can take steps to rectify the untimely notice to the Lieutenant Governor's office. In compliance with the Sunshine Law, the Commission has the opportunity to recess and reconvene on December 6, 1995, at 9:00 a.m., State Capitol, Room 312. **Therefore, the meeting that was scheduled for December 6, 1995, to hear public comments on the draft will be held as scheduled.** The meeting scheduled for December 7, 1995, in the notice attached will be to vote and finalize the draft.

*A Attachment 7*

**SUMMARY OF PUBLIC RESPONSES**

**as of 12/3/95**

**Letters Supporting the Commission's Recommendations:**

**From Organizations: 6**

**From Petitions: 26 names from 1 groups**

**From Individuals: 136**

**Letters Not Supporting the Commission's Recommendations:**

**From Organizations: 6**

**From Petitions: 1379 names from 4 groups**

**From Individuals: 61**

*Attachment 8*

FOR

**Organizations**

1St Church of Religious Science, Keaau, 96749  
\*ACLU, Honolulu 96801  
First Unitarian Church of Honolulu, 96817  
\*GLEA Foundation, Honolulu 96837  
Governor's Committee on AIDS, Honolulu 96801  
United Church of Christ

**Petitions**

Peoples Petition (Martin Rice-Kauai)  
26 names

**Individuals**

Unreadable, Honolulu 96816  
Scott Adams, Honolulu 96813  
Timothy G. Agar, Kailua 96734  
Robert Aitken, Honolulu 96816  
Wayne K. Akana, Honolulu 96825  
Alexander Aki, Hilo 96720  
Robert M.W.Y. Aki, Hilo 96720  
Sue L. Aki, Ph.D., Hilo 96720-4091  
Antarais, Kapaa 96746  
Bob Applewhite, Honolulu 96818-2798  
Angie Baker, Kurtistown, 96760  
Ruth Baldino, 524-5559  
Gary Bardsall, Honolulu 96815  
Lance Bateman, Honolulu 96822  
Tracey Bennett, Honolulu 96817  
Karen Blue, Kurtistown 96760  
Patrick W. Border, Honolulu 96817-4764  
Lynne Boyer, Honolulu 96822  
Stan Burdua, Eleele 96705  
Robert "Skip" Burns, Jr., Captain Cook 96704  
Lori A. Campbell, Mililani 96789

James F. Cartwright, Honolulu 96826  
Chanel Channing, Kanehohe 96744  
Rene M. Chinen, Mililani  
Gail Chun, Honolulu 96821  
Catherine Copeland, Pahoa 96778  
Gloria Crawford, Kaimuki 96816  
Brian R. Curll, Honolulu 96822  
Eric Dela Cruz, Waipahu 96797  
Patrick di Battista, Honolulu 96822  
Reka Domokos, Honolulu 96822  
Terri J. Echebarger, Honolulu, 96826  
H.L. Esselstyn, Kailua 96734  
Michael G. Esch, Honolulu 96819  
Todd Y. Fukuda, DMD, Honolulu 96816  
Alana Gay, Hilo 96720  
Don Gershberg, Kapaa 96746  
Jose Alfredo Gomez, Honolulu 96822  
Leslie Graham, Honolulu 96826  
Amy C. Gregg, Pepeeko 96783  
Alex Habib, Honolulu 96826  
Karla A. Henry, Kapaa 96746  
Thomas Lee Hilgers, Honolulu 96822  
Steven Ho, Kaneohe 96744  
Tom Hoffart, Honolulu 96817  
Robert John Holloway, Honolulu 96812-4202  
Jean and Grant Howard, Honolulu 96822-2850  
Milo D. Huempfer, RN, MS Nanakuli, 96792  
Tom Humphreys, Ph.D., Honolulu 96822  
Morris B. Husted, Kea'au 96749  
Adolfo Jaquez, 96815  
Terry L. Johnson, Honolulu 96826  
Nahekeapono Ka'iuwailani, Esq., Hilo 96720  
\*Nancy S. Kern, Honolulu 96821  
Len King, (see Garry Bardsall)  
Robert King (see Stan Burdua)  
Lawrence H. Klebes, Waipahu 96797  
Noa Kristi, Hilo 96720

\* indicates they plan to testify on December 6, 1995.

Barbara Lass, Hilo 96720  
Annelle Lee, Honolulu 96819  
Bryan D. Loetz, Honolulu 96816-1812  
Reno M. Long, Honolulu 96816  
Gayle F. R. Lovinger, Kailua 96734 (See. H.L. Esselstyn)  
Noland C. Lucas, Honolulu 96815  
Chuck R. Lyden, Honolulu 96815  
Kathy MacIntyre, MSW, Kaneohe 96744  
Eberhard Mann, M.D., Honolulu 96814  
Nathan Martelle, Honolulu 96822  
Jason Masagatani, Kapaa 96746  
Anthony B. Mathis, Hakalau 96720  
Lee McCaslin, Honolulu 96816  
Robin M. McInstosh, Honolulu 96819  
Jim McNaly, Kapaa 96746  
Jim Mellon, Hilo 96720  
Douglas K. Mickelson, Pepeekeo 96783  
Louis Mintag (?) no address  
Dr. Sherryl Mleynek, Hilo 96720  
Buddy Montgomery, Honolulu 96815  
Michael Molloy, Honolulu 96825  
Keiich R. Morita, Honolulu 96825  
Robert J. Morris, Esq., Honolulu 96813  
Robert B. Neale, Honolulu 96815  
Margaret Nielsen, Honolulu 96817  
Noriko Ohashi, Honolulu 96814  
Patricia O'Neill, Hilo 96720  
Bruce Oxford, Honolulu 96825  
Teresa Parsons, Kailua 96734  
J. William Potter, Honolulu, 96822  
Fred Rainville, Kapa'a 96746  
Tom Ramsey, Honolulu 96822  
Julie Rawlins, Honolulu 96815  
Susan T. Reardon, Kailua 96734  
Alison Regan, Ph.D., Honolulu 96822  
Martin Rice, (See Fred Rainville)  
Kevin M. Roddy, Kea'au 96749  
Scott Roman, Honolulu 96816  
Linda S. Rosenberg, Kailua 96734  
Rhonda Rosenberg, Kailua 96734  
Patricia A. Ross, Honolulu 96839  
Greg M. Sato, Honolulu 96813

Daron Scarborough, Honolulu 96815  
John P. Schamber, Kailua 96734  
Sharon J. Schamber, Kailua 96734  
Richard Schmidt, Honolulu 96825  
Kate Schuerch, Kurtistown 96720  
Guy B. Shepard, V, Honolulu 96816  
Joseph K. Shorba, Honolulu 96817  
Jim Slagel, Kane'ohe 96744  
Kimlynn Lee Slagel, Kane'ohe 96744  
Dale W. Spalding, Honolulu 96816-2432  
C.K. Smith, Honolulu 96813  
Andrew Thomas, Honolulu 96815-2127  
Sali Toda, Honolulu 96818  
Don Toschi, Kapaa 96746  
Michael Towler, Honolulu 96822  
Matt A. Tsukazaki, Honolulu 96813  
Michael Tucker, Honolulu 96816  
Debi Urwiler, Lihue 96766  
Milton Valmoja, Honolulu 96826  
Gordon N. Van Brunt, Kapaa 96746-9516  
Lexi Van Ells, Honolulu 96817  
Anne C. Virnig, M.D., Honolulu 96822  
George Vye, Honolulu 96815  
Allan Wang, M.D., Honolulu 96822  
Richard Wheatley, Honolulu 96813  
Laura Whitcomb, Pepeekeo 96783  
Kelly Wilson, Honolulu 96728  
Lynn Wilson, Ph.D., Honolulu 96839  
Art Wong, Honolulu 96816  
Constance T. Worland, Hilo 96720  
Ruth M. Yoshigai, Honolulu 96822-1121  
John S. Yoshigai, Honolulu 96822-1121  
Wayne S. Yoshigai, Kailua 96734

## AGAINST

### Organizations

Christian Ministry, Kahului 96732  
Church of God of Prophecy, Kaneohe 96744  
Church of the Nazarene, Ewa Beach 96706  
Matsuyama Construction Co, Kailua-Kona 96745-4181  
Sterman Realty, Haleiwa 96712  
Windward Worship Center, Kaneohe 96744

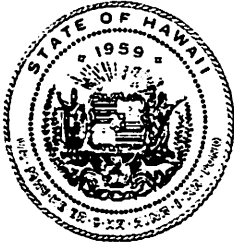
### Petitions

Karen Arincorayan, 696-4512  
20 names (11/6)  
29 names (11/7)  
First Southern Baptist Church of Pearl Harbor 96818  
24 names  
Good Shepard Lutheran Church, Honolulu 96817  
22 names (10/25)  
Great Commission Fellowship International  
22 names (8/12)  
12 names (9/13)  
50 names (9/14)  
25 names (9/15)  
50 names (9/18)  
50 names (9/21)  
67 names (9/24)  
17 names (10/5)  
18 names (10/11)  
14 names (no date)  
17 names (no date)  
25 names (no date)  
99 names (10/24)  
175 names (11/2)  
229 names (11/8)  
122 names (11/15)  
62 names (11/20) Kauai  
12 names (11/20) Oahu  
26 names (11/24)  
137 names (12/1)  
Haili Church - 54 names, Hilo 96720

### Individuals

Anonymous  
Anonymous  
John ?, 236-2931  
Unreadable signature, Kona 96740  
Alicia K. Akau, Keal. 96750  
Marilee Baumgartner 96816  
Thomas G. Bowlin, Pastor, Kaneohe 96744  
John L. Burke, Honolulu 96815  
Tina L. Cavataio, Kailua-Kona 96740  
James C.K. Chun, Honolulu 96813  
Walter Chun, Honolulu 96814-1106  
Tracey M. Cooma-Cawallio, Kailua-Kona 96745  
Concern (sic) Citizen  
Concerned Citizen  
Concerned Citizen  
R.S. Dick, Honolulu 96815  
Lori Ann Dorsey, Waipahu 96797  
Tom and Liz Dunn, New Jersey 08016  
Scott Folsum, Kailua 96734  
Howard D. Francis, Honolulu 96814-5010  
Dr. and Mrs. Alton Fujii, Honolulu 96822  
Gary M. Hanada, Kapaa 96746  
Jim Hedemark, 523-6160  
Fr. Joseph Hendricks, Makawao 96768  
Roy T. Ishizaki, Honolulu 96817  
Julian C. Johnson, Jr., Col. USAF (Ret.) 96826  
David Kawate, Lawai 96765  
Keith Kokos, Haiku 96708  
Michael Lee, Honolulu 96816  
Neil Loyola, Kailua-Kona 96740  
Patrick R& Laurie N Lucas, Kailua-Kona 96745  
Marie Lum, No address  
E.Lum, No address  
E. Lum, No address  
Mr & Mrs Willis Maeda, Honolulu 96813-1543  
G.T. Makelona, No address  
Dwight Matusyama, Kailua-Kona 96745

Tommy L. Moore, Kapolei 96707  
Maureen Monroe, Kapaa 96746  
Sally Ann M. Mow, Honolulu 96822  
Clytie Nishihara, Wailuku 96793  
S. Nishimura, Honolulu 96822  
Don Ostrem, Kihei 96753  
Susan Phillips, Kailua 96734  
Ted L. Pond, Waianae 96792  
Sheryl Robertson, Kailua 96734  
Charles E. Roseberry-Matsuzawa, Hon. 96816  
Asako Saito, No address  
Herbert C. Sharp, Honolulu 96813  
Anna Belle Smith, Kailua 96734  
Maria Smith, Kekaha 96752  
\*Pastor Mike Stangel, Haleiwa 96712  
Larry Stewart, Kapaa 96746  
Nancy Stewart, Kapaa 96746  
Mark Turansky, Waipahu 96797  
James A. Tweedie, Pastor, Mililani 96789  
\*Charles and Mary Woodard, Honolulu 96822



**Commission on Sexual Orientation and the Law  
Legislative Reference Bureau  
State Capitol, Room 446  
Honolulu, HI 96813**

**Phone: (808) 587-0666      Facsimile: (808) 587-0681**

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*Thomas P. Gill, Chairperson  
Lloyd James Hochberg, Jr.  
Robert H. Stauffer*

*Morgan Britt  
Nanci Kreidman*

*L. Ku'umeaaloha Gomes  
Marie A. "Toni" Sheldon*

**MINUTES OF THE MEETING HELD  
ON THURSDAY, DECEMBER 7, 1995  
(Continued to December 8, 1995 and December 13, 1995  
and as Approved at January 4, 1996 Meeting)**

**I. Call to Order**

The seventh meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:20 a.m. at the State Capitol in Room 309, 415 S. Beretania St., Honolulu. Members present were:

Thomas P. Gill, Chairperson  
Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

Morgan Britt  
L. Ku'umeaaloha Gomes  
Lloyd James Hochberg, Jr.

A copy of the final report dated December 7, 1995 was distributed to the Commissioners.

Legislative Reference Bureau staff explained that the text of the report had all the changes received as of December 6, 1995. She stated that there might be some grammatical, technical and typographical errors that would be handled before the official printing of the report. Of note, she stated that she had received specific statutory cites from the minority with regard to their draft legislation for expanding the definition of family. She expected that re-drafting the legislation with these specific citations would increase the number of pages of the legislation. LRB staff reviewed the other appendices as attached.

**II. Finalize and Vote on Report to Legislature**

Mr. Hochberg asked to include Dr. Kehoe's testimony to counteract Dr. Bidwell's testimony that was included in the appendices. Dr. Stauffer explained that Dr. Bidwell's testimony was included to balance Diane Sutton's testimony, also included in the appendices. The LRB staff commented that both Dr. Bidwell and Diane Sutton's testimony is available in the minutes and both could be removed.

A disagreement on what should be added or not added to the appendices included Mr. Hochberg's statement that in the discussion of the matter he did not want to waive his right to put what ever he wanted in the appendices. He stated that this is based on his understanding of the majority's previous agreement to allow the minority to present their points unedited by the majority. The Chair clarified for Mr. Hochberg that the majority was allowing the minority the opportunity to present their opinion in the report.

Mr. Hochberg stated that the minority wanted to include four additional items in the appendices, as follows:

- (1) A one-page article addressing the "Homosexuality" article.
- (2) An article written by Dr. Charles Socarides.
- (3) An article refuting the Boswell information included in the Appendix under Other References.
- (4) The testimony of Dr. Kehoe, to refute the testimony of Dr. Bidwell.

Mr. Hochberg's position was that the Commission had not discussed the material and so it must be included in the minority portion of the report so that a complete report will be made to the legislature.

Ms. Kreidman stated that it is unfair for the minority to say the Commission did not discuss the minority material. Whether or not the material is included verbatim in the report, she believes the Commission had some substantive discussions.

Ms. Sheldon read a passage from her written "Proposed amendments to October 25 minutes" in conjunction with the agreement that was put forth regarding what was to be included by the minority. Ms. Sheldon stated that the minority believed that this was their "turn" to put their material into their report. Ms. Gomes clarified that it is not two reports but one report with a minority opinion. Mr. Britt added that the Commission did a study of the issues, and the majority has found that the minority position facts are inaccurate and unsubstantiated.

Dr. Stauffer pointed out that the minority did not submit any written material until November 22. While other members of the Commission met the internal deadlines of the meeting schedule adopted at the first meeting.

Chairperson Gill added that the Commission is not opposed to including a small amount of new material. For example, the majority added three pages from Dr. Bidwell to balance testimony from Diane Sutton. Mr. Hochberg felt it was critical for the legislators to hear what Ms. Sutton has to say and said that the majority should not be afraid to include the material. Mr. Gill confirmed that Ms. Sutton's testimony was already included.

Dr. Stauffer made a motion to adopt the appendices as LRB has presented them. Ms. Gomes seconded the motion.



During the discussion period, Mr. Britt brought up that a memo to the Commission from Mr. Aitken addresses Ms. Sutton's testimony. It was agreed not to include the memo from Mr. Aitken.

The motion to adopt the appendices as LRB had presented them passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, Dr. Stauffer and the Chairperson voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Chairperson Gill then addressed the text of the report. Mr. Hochberg stated that he has not had a chance to read the full report. Ms. Kreidman agreed the Commission should recess and reconvene at 4:00 p.m. tomorrow to have an opportunity to read the report. Everyone agreed.

The room where the continuation of the meeting will be held will be posted in all the elevators of the State Capitol and on the Public Announcement Board at the chamber level of the building.

There were no public comments.

The meeting recessed at 10:17 a.m. on Thursday, and reconvened on Friday, December 8 at 4:10 p.m. in Room 309, State Capitol Building.

#### **December 8, 1995**

All members were present. LRB staff stated that she had modified the minority's proposed draft legislation relating to family which changed it from a one-page document to a thirty-nine-page document. Additionally, she wanted to insure that each member had received a letter dated December 7, 1995, from the Speaker of the House of Representatives, Joseph Souki. She faxed it to each member. A copy of the letter is attached to these minutes as Attachment 1.

In light of Speaker Souki's concern for a full report, Mr. Hochberg moved to re-open the issue of adding items to the agenda and moved to include the four items previously requested be added to the appendices:

- (1) A one-page article addressing the "Homosexuality" article;
- (2) An article written by Dr. Charles Socarides
- (3) An article refuting the Boswell information included in the Appendix under other References.
- (4) The testimony of Dr. Kehoe, to refute the testimony of Dr. Bidwell.

Ms. Sheldon seconded the motion.

During the discussion period Dr. Stauffer spoke against the motion but made a point that it was out of no disrespect for Speaker Souki. Dr. Stauffer believed that Speaker Souki would be getting a complete report without the addition of the appendices, and as the Commission agreed not to add any substantive material after December 6, Dr. Stauffer believes the additional appendices should not be included.

A vote taken on the motion to add to the appendices did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and the Chairperson, Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Chairperson Gill then stated that he would entertain a motion to accept the text of the written report. Mr. Hochberg suggested that there be separate votes on the minority and majority portions of the report. He made a motion to that effect, that was seconded by Ms. Sheldon. During the discussion of the motion the Commission agreed that it was awkward for the majority to approve the minority portion, and vice versa. It was agreed that a positive vote for the Report by the majority was not stating that they were agreeing with the content of the minority portion, only of its existence. On the other hand, it was also agreed that a negative vote by the minority in accepting the Report was qualified in that it was not rejecting the minority portion. With that agreement, Mr. Hochberg withdrew his motion for a separate vote.

Dr. Stauffer made a motion to accept the final December 7, report with the requisite grammatical, typographical and technical nonsubstantive changes to be made by the Legislative Reference Bureau. Ms. Gomes seconded the motion.

The motion to accept the report as presented in the December 7, 1995 draft passed with the Chairperson, Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay with the stated qualifications as agreed above.

The matter of the minutes of the meetings of October 25, November 8, and November 22 that was put over from the last meeting was the next item of business. A motion was made by Ms. Kreidman and seconded by Mr. Britt to continue the meeting until December 13, 1995 to address the minutes. The motion passed with unanimous approval.

The meeting place will be posted in the elevators and at the public information board at the chamber level on the day of the meeting.

The meeting was recessed at 5:00 p.m.

#### **December 13, 1995**

The meeting was reconvened at 9:15 a.m. on December 13, 1995, in Room 312, at the State Capitol. Ms. Gomes was excused. All other members were present.

The Legislative Reference Bureau staff informed the Commission that the advance copies of the final report will be available Friday.

Minutes of the Meeting of October 25 were addressed first. Ms. Sheldon had prepared written proposed amendments to the draft. Dr. Stauffer had made some hand-written comments that the staff of LRB was unable to transcribe in time for the meeting. Copies of Dr. Stauffer's handwritten comments were handed out. It was later determined that the copies of Dr. Stauffer's comments had only the odd pages.

Ms. Kreidman suggested that if there are any objections to any of the suggested amendments it should be brought up and discussed. The Chair agreed, and the amendments were reviewed page by page. If there were no objections the amendment is accepted.

Ms. Sheldon's proposed amendments attached as Attachment 2 to these minutes were addressed first. The Commission managed to review Ms. Sheldon's amendments through Page 30 on the original 107 page draft of the Minutes of October 25, 1995.

All proposed amendments by Ms. Sheldon as listed through Page 30 were accepted as drafted except as follows:

- (a) On page 1, the 16th line is replaced to read "The Commissioners were given a few minutes opportunity to review and discuss the suggested amendments. Dr. Stauffer added that Sister Chatfield's title on page 11 was not capitalized."
- (b) On page 3, an explanation of the testimony attached will be added after T-9, "of the testimony attached to these minutes"
- (c) On page 3, the proposed amendment is further modified in (3) by changing "who" to "that" and by removing "except as to kids in high school" and inserting "generally" before the word "discourages".
- (d) On page 4, the correct spelling of "segwayed" to "segued".
- (e) On page 5 the statement by Mr. Van Dyke regarding the Supreme Court's ivory tower is broken into two sentences for clarity.
- (f) On page 7, second full paragraph, correct the spelling of compromises in the last line.
- (g) On page 9, the second paragraph of Mr. Rohlfing's testimony add "that it errs" at the end of the second to last sentence.
- (h) On page 11, Mr. Britt clarified his discussion with Mr. Rohlfing in the first paragraph.
- (i) On page 12, only the second paragraph of Ms. Sheldon's amendments were used and the rest is taken from the Suggested substantive amendments attached as Attachment 3, prepared by LRB. Mr. Hochberg asked to include the references he researched, as listed in Footnote 264 of the Report. It was also decided to include Mr. Coleman's charts in the testimony part of the minutes with a reference to the charts in the body of the text.

The Commission recessed for ten minutes from 10:15 and 10:25.

- (j) On page 18, the first three paragraphs of Ms. Sheldon's proposed amendments are withdrawn and replaced with the LRB version in Attachment 3 except Ms. Sheldon's statement that "Mr. McGivern stated that this is the first time he ever appeared before a body, knowing that what he and others had to say makes no difference." is included.
- (k) Everything after reconvening but before "III." is included except the fourth paragraph and with the addition of the voting record in the seventh and eight paragraphs.
- (l) Insert the words "described the motion as an adoption of a guiding principle for the Commission's work, because defining "major" was necessary" after "Dr. Stauffer" in the fourth paragraph on page 19. Remove the rest of the sentence.

While there were no objections to the proposed amendments on page 20, Dr. Stauffer expressed concern at the transcription of casual banter between the Commission members. The Chairperson was not concerned.

- (m) Page 21 amendments were withdrawn by Ms. Sheldon.
- (n) Page 25 amendment was modified to read "It was noted by Mr. Hochberg that there was no second, at which point the motion was seconded."
- (o) Page 27 amendments were discussed regarding whether the minutes were supposed to be verbatim transcriptions and what the law required. A proposed statement by Mr. Roth regarding other jurisdictions was at issue. The question was whether or not the amendment was misquoting Mr. Roth. There was disagreement on this. There was also discussion and disagreement as to the Commission's agreement regarding the treatment of other jurisdictions.

A compromise was reached that replaced the word "actually" with the word "also"; removed the last sentence in the first paragraph; and inserted "he understood that" in the last sentence of the second paragraph just after, "Mr. Hochberg pointed out that..."

- (p) Initially no objections were raised to the amendments proposed for page 29 but there was discussion concerning the minority's understanding of "when we get to your section.". The Chair asked Ms. Sheldon to clarify. Ms. Sheldon stated that if referred to the minority's turn. Ms. Kreidman' asked for further clarification on when the minority perceived as their turn, now, in the report or some other time? Ms. Sheldon believed that the minority turn never came, they expected the majority to submit their material for comment. Dr. Stauffer pointed out that all the Commissioners knew the internal deadlines to bring in materials to present for the different stages of the Commission's discussions

and there were no materials presented by either Ms. Sheldon or Mr. Hochberg. He believed that if those deadlines were made by other members of the Commission the minority should have been able to meet them.

Regarding the second proposed amendment on page 29, Mr. Hochberg stated that amendments are needed because the minutes are too passive. LRB staff agreed that her recitation of the events in the meetings passive and toned down on both sides.

Ms. Sheldon moved to accept the paragraph starting "Mr. Gill told Mr. Hochberg", which was seconded by Mr. Hochberg. A discussion yielded a modification of the paragraph that removes the second and third sentence of the paragraph. There was no objection as amended, and the motion was withdrawn.

(q) The proposed amendment on page 30 was withdrawn.

The Chairperson noted the time and the Commission agreed the task could not be completed today. The LRB staff brought up that an item in the November 8, 1995 minutes needed to be addressed.

Ms. Sheldon referred to "Proposed amendments to November 8, 1995" and withdrew her proposal to amend page 4 of the draft minutes of November 8, 1995. There was no objection by the Commission.

Ms. Sheldon commented that this item is reported in the minority opinion and she would like to edit the minority chapter (page 88) to accurately reflect the events of November 8.

Dr. Stauffer moved that minority opinion can be edited to reflect this change. Ms. Kreidman seconded. The motion passed with the Chairperson, Mr. Britt, Ms. Kreidman, Ms. Sheldon, and Dr. Stauffer voting aye. Mr. Hochberg abstained.

The LRB staff confirmed with the Commission that the minutes of November 8 are not completely approved or finalized.

Mr. Hochberg passed out the attached copy of information he copied off the Internet attached to these minutes as Attachment 4.

Dr. Stauffer moved to adjourn and notice the meeting for January 4, 1996. Mr. Britt seconded the motion. The motion was unanimously passed.

JOSEPH M. SOUKI  
SPEAKER

HOUSE OF REPRESENTATIVES

STATE OF HAWAII  
STATE CAPITOL  
HONOLULU, HAWAII 96813



December 7, 1995

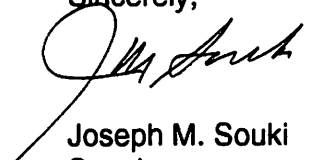
Mr. Thomas P. Gill, Esq.  
Chair, Commission on Sexual Orientation and the Law  
547 Halekauwila Street, Suite 202  
Honolulu, Hawaii 96813

Dear Chair Gill and Commissioners:

It has come to my attention that in preparing the Commission's Report to the Legislature in response to Act 5, Session Laws of Hawaii 1995, you have decided by a majority vote today to restrict the content of the final document in a manner which will result in an incomplete report being presented to the Legislature. In particular, I understand that the two members holding the minority opinion have been restricted from adding certain materials to the report appendix which respond to materials the majority of the Commission added to the draft report which was distributed for the first time just this morning.

I am very concerned that the Commission render a complete report to the Legislature, fully addressing both sides of this important issue. Any effort to interfere with such a report would not be well accepted. Please see to it that the report is complete, from both sides.

Sincerely,



Joseph M. Souki  
Speaker

c: Commissioner Morgan Britt  
Commissioner L. Ku'umeaaloha Gomes  
Commissioner Lloyd James Hochberg, Jr.  
Commissioner Nanci Kriedman  
Commissioner Marie A. Sheldon  
Commissioner Bob Stauffer

Attachment 1

**PROPOSED AMENDMENTS TO OCTOBER 25, 1995 & CONTINUING MINUTES  
Submitted by Marie A. "Toni" Sheldon**

**Page 1** After the 10th line, sentence beginning "Ms. Pamela Martin of the ...", add following paragraph:

**Ms. Martin distributed a one-page document entitled "Suggested Amendments to the Minutes of October 11-12 As Drafted" to the Commissioners.**

**Replace the 16th line which begins "Opportunity to review..." with the following:**

**The Commissioners were given a few minutes' opportunity to review the suggested amendments, and no discussion was held regarding the suggested changes beyond Dr. Stauffer's adding that Sister Chatfield's title on page 11 was not capitalized.**

**Delete the sentence beginning "Dr. Stauffer added that Sister..."**

**Page 2** In the 4th line, the word "any" should be "aye".

**Page 3** Regarding the paragraph that begins "Mr. Van Dyke discussed various race-oriented cases...", explain where/what "T-9" is and where it can be found.

**In the 2d full paragraph which begins "Mr. Va Dyke reviewed the alleged ...", change (2) to read as follows:**

**(2) create disproportionate incentives to move or remain in Hawaii, costing the state money and distorting the job and housing markets as well as altering the desirability as a visitor destination; ....**

**In the same paragraph, change the sentence beginning "Finally, addressing...." to read:**

**(3) Mr. Van Dyke agrees that the government may set moral standards but thinks it is hard to defend punishing people that don't meet that standard.**

**Before the paragraph beginning "Mr. Van Dyke presented..." add the following paragraph:**

**Mr. Van Dyke shared his belief that the procreation argument is a problem because the State has not consistently applied that interest. In fact, Mr. Van Dyke believes the State discourages procreation except as to kids in high school. Mr. Van Dyke does not believe the State can successfully meet the "narrowly tailored" requirement.**

Page 7 In the 2d full paragraph, 5th line, the word "and" should be "by" and the word "their" should be "the" and turn the sentence into two sentences as follows:

Mr. Hochberg tried to confirm with Mr. Van Dyke his position "by" returning to the Baehr decision and "the" belief that same-sex marriage is not part of the collective conscience of Hawaii. Mr. Hochberg cautioned that in light of the history, we don't want to throw out all this information to simply move this forward, and we need to sit down and think it through in a lot greater detail.

Page 9 With regard to the paragraph which beings "Copies of the overhead presentations...", clarify whether these are the items marked "T-9", etc referred to earlier in the minutes.

In line 2, of the 3d full paragraph, the word "start" should be "started".

Page 10 In line 2, the word "woman" should be "women".

In the 3d full paragraph the word "Rohlfing's" should be "Rohlfing"..

Page 11 In the 2d full paragraph, line 1, "so a extending" should be "so extending".

Page 12 Add the following paragraphs:

Mr. Hochberg questioned Mr. Coleman as to the unavailability of information concerning Mr. Coleman's organization under which he presents much if not all of the information he has furnished to the Commission, The Spectrum Institute. Mr. Coleman stated that he has been working on this issue here in Hawaii since the legislative hearings on the issue. Mr. Coleman did not clarify the identity of The Spectrum Institute.

Mr. Coleman suggested that there are five possible actions available to Hawaii: (1) do nothing which he predicts will result in court-ordered same-sex marriage; (2) pass a Limited Domestic Partnership Act which he believes will have the same result as (1); (3) pass a Comprehensive Domestic Partnership Act which he predicts the Court may accept as satisfying the equal protection clause; and (5) eliminate marriage as a civil institution which Mr. Coleman predicts will not happen.

Mr. Hochberg suggested that Mr. Coleman omitted the sixth possible action of passing a constitutional amendment defining marriage as one man and one woman.



Although Mr. Coleman agreed that is a possible action, he declined to add that possibility to his list.

Mr. Gill asked Mr. Coleman to provide the Commission with a draft comprehensive partnership bill.

Page 18 Before the 1st paragraph, add the following paragraphs:

Mr. Daniel P. McGivern testified before the Commission, stating that: "This Commission is not objective. It is a sham, a shibai, a fraud perpetrated on the public. The outcome of the Commission's voting on whether marital benefits should be extended to homosexual and lesbian couples has been known since the Commission was first appointed." Mr. McGivern stated that "the real purpose of the Commission is to hand a favorable report to the legislature, leading to a domestic partnership law in the next legislative session." Mr. McGivern stated that "a domestic partnership law, which recognizes gays as a special class, will inevitably lead to same-sex marriage. It is sad that this Commission does not truly represent the community." Mr. McGivern stated that this is the first time he ever appeared before a body, knowing that what he and others have to say makes no difference. He stated that "IF anything is said that is contrary to furthering the homosexual-lesbian agenda, it will be disregarded by the majority of this commission." A copy of Mr. McGivern's testimony is attached hereto.

Mely McGivern testified that in her view, the Hawaii Nei where she was born and raised is very close to becoming the "Sodom and Gomorrah" of the world. She pointed out that we could easily end up with both domestic partnerships and same-sex marriage. She cautioned that what Hawaii does now could have an adverse effect on the whole world. Mrs. McGivern's testimony is attached to these minutes.

Two mothers present with their children testified in opposition to same-sex marriage. One mother said that while she does not judge them, she is opposed to special rights for same sex couples, such as military housing rights. She said that she believes they are doing this for free rent and the government will be paying for these rights. The second mother testified that her opposition is Bible-based and that the state motto used to stand for something in the past.

After the reconvening paragraph but before "III", add the following paragraphs:

Mr. Hochberg called the Commission's attention to the imbalance of the minutes.

Mr. Gill stated: "We have to be polite and hear what everyone has to say."

Mr. Hochberg moved that the materials presented by Mr. Ghali and other speakers be listed in the minutes. Ms. Sheldon seconded the motion and Mr. Stauffer spoke in favor of it. The motion passed with 4 ayes and 3 abstentions.

Mr. Hochberg moved to add the clinical psychologist credential to Dr. Kehoe's name in the October 11, 1995 minutes. The motion failed with 3 ayes and 3 abstentions.

Mr. Hochberg then inquired about the fact that Kalei-Pua who introduced herself as Ku'umeaaloha Gomes' domestic partner was not identified as such in the minutes, but Ms. Gomes declined to have the minutes reflect such identification.

Mr. Hochberg then moved that the minutes reflect that Ms. Martin produced a written transcript of portions of the audio tape from the September 27, 1995 minutes and they were discussed. Dr. Stauffer, speaking against this motion, stated that he understood changes were to be presented in writing ahead of time. Whereupon Mr. Gill questioned Mr. Hochberg as to the amount of changes he had to present. Mr. Hochberg asked to be permitted to present those he had submitted in writing. After much discussion, Mr. Gill asked Mr. Hochberg to restate his motion, and Dr. Stauffer described that motion as a lengthy one concerning Ms. Martin's transcript.

Mr. Hochberg moved to have his changes incorporated in the minutes, but Mr. Gill stated that what Mr. Hochberg wants is a transcript and he won't get it. Mr. Gill stated: "We have to move on and not spend time going over this."

Dr. Stauffer then moved to suspend discussion on the minutes and send out a new written transcript. Mr. Hochberg spoke against the motion stating that majority had an agenda to railroad this through. Mr. Hochberg pointed out that the policy of review is not established as requiring written proposed amendments and that these (the October 11, 1995) minutes contain the most important testimony on economic matters. Mr. Hochberg noted that failing to review the contents of these minutes diminishes the value of the majority report and makes its contents intellectually dishonest. Mr. Hochberg then moved to handle those amendments he had submitted in writing.

Mr. Gill ruled Mr. Hochberg out of order. Mr. Hochberg appealed the ruling, Ms. Sheldon joined in that appeal. Mr. Hochberg's appeal was defeated, and Mr. Gill refused to permit Mr. Hochberg to put his written changes on the record.

Mr. Gill informed Mr. Hochberg that his right to bring the amendments to the October 11, 1995 Minutes was being reserved and he could bring up those amendments at a later time.

Page 19 After the 3d paragraph, add the following paragraphs:

Mr. Hochberg moved to table all discussion on substantive material until the Commission looks at the statutes it received on October 25, 1995, analyzes the LRB attorney's report of the definitions of those statutes, and actually determines whether there are any major legal and economic benefits in those statutes which the Commission needs to address.

Ms. Sheldon inquired as to the fact that Dr. Stauffer's memos address things the Commission has not discussed. Mr. Gill stated that was not true, that the Commissioners had received a list of the statutes and had time to review them. Ms. Sheldon replied that reviewing the LRB's list is not the same as discussing the statutes.

Ms. Kriedmam inquired as to whether Ms. Sheldon wanted to go through the statutes and determine whether it's a benefit or burden. Ms. Sheldon replied that she does not think we have determined what is a benefit and what is a burden because we do not have a definition.

Dr. Stauffer stated that the motions he intends to bring will address all statutes.

Dr. Stauffer stated that it is vital that we begin defining our terms. He stated that major legal and economic benefits are not defined in the legislation or committee reports so we use normal and customary meaning.

Page 20 In the 3d full paragraph, line 3, after the word "business." add the following sentence:

Mr. Gill stated that we don't want to get wrapped up in a convoluted definition of what we thought the legislature meant if they thought about it at all which is why Mr. Hochberg's motion failed twice early on.

At the end of the 3d full paragraph, add the following paragraph:

Mr. Hochberg sated that major means significant and salient means stands out. Mr. Gill stated that "we're (the majority members of the Commission) are just making sure that Mr. Hochberg doesn't gas the thing to death and try to kill the report."

Page 21 At the end of the 6th paragraph which reads: "Dr. Stauffer again called for the question.", add the following sentence:

Mr. Hochberg moved to amend the motion which is typically then taken up, but the motion was refused by the Chair.

Page 25 Just before the last paragraph on the page, add the following:

Mr. Gill refused to let the motion die for lack of a second.

Page 26 At the end of the 4th paragraph, add the following:

Ms. Sheldon also stated that earlier expert testimony indicated a good chance that the same-sex relationships may fall within exceptions to the full faith and credit clause and may not be recognized by other states.

Page 27 After the 2d paragraph, add the following paragraphs:

In speaking against the motion, Mr. Hochberg called the Commission's attention to the fact that Professor Roth actually said thin in his opinion he didn't think the feds were going to buy domestic partnerships from Hawaii, particularly if they co-exist with marriage. Therefore, misquoting him or taking him out of context does not make the Commission look very well.

Mr. Hochberg stated that the "findings" keep coming up concerning major legal and economic benefits despite the fact that we don't have a definition. Further, as Mr. Van Dyke informed the Commission, pursuant to the Dred Scott decision, one state cannot legislate another's reality. Finally, Mr. Hochberg pointed out that the Chair, at the outset, stated that we would not be addressing these issues.

In paragraph 3, line 2, remove one of the words "was".

Page 29 In line 5 which begins "in a separate motion." add the following at the end of the word "motion" before the period:

"when we get to your section."

At the end of the last paragraph add the following:

Mr. Gill told Mr. Hochberg that "We don't go forward and then go back. It's a way of wasting time." Mr. Hochberg replied that it makes him have to do double work. Mr. Gill stated: "That's very hard, we all have to do work." Mr. Hochberg replied that "We could just deal with it here and you guys could vote it down."

Mr. Gill stated: "You put it in good shape, let everybody look at it and then when your time comes to put up your suggestions, and so forth."

Page 30 At the end of the 4th paragraph add the following paragraph:

Mr. Gill then asked Mr. Hochberg if there was any more time he wanted to waste. Mr. Hochberg stated that it really was not wasting time, it's trying to appropriately address.... Mr. Gill interrupted, saying "We understand exactly what you're doing."

Page 37 After line 2 add the following paragraph:

Mr. Gill stated that: "In other words we are going back to the minutes to wipe out the motion we're supposed to be considering, that's a very interesting suggestion." Whereupon Mr. Hochberg called for the vote on the Motion to Table.

Page 41 At the end of line 3 add the following:

Mr. Gill stated: "We're going back to make another dance here. If I could have the Commission's attention, the motion is to insert the word "salient" in all the particular spots in Benefit No. 1."

At the end of the first sentence in the paragraph immediately after the heading "Memorandum No. 7", add the following:

Mr. Gill asked Dr. Stauffer to explain Substantial Benefit No. 2 which Dr. Stauffer agreed to explain, "if there was a second." Whereupon ... [the motion was seconded by Ms. Kreidman.]

Page 43 After the 4th full paragraph, add the following paragraph:

A discussion ensued between Mr. Hochberg and Mr. Stauffer concerning the health insurance benefits.

In the 6th full paragraph, line 2, change the sentence

that begins "He offered to ..." to read as follows:

Dr. Stauffer said he would get the source of the information for us. Mr. Gill stated that perhaps Dr. Stauffer could give it to Mr. Hochberg for review. Mr. Hochberg voiced concern that in the meantime that information would be left in the report as truth, stating: "That's the trouble with the conduct of these proceedings."

After the 6th full paragraph, add the following paragraph:

Mr. Hochberg then voiced his overall philosophical objection to this whole proposed benefit because.... Whereupon Mr. Gill interrupted accusing Mr. Hochberg of being "focused on delay and causing trouble."

Page 47 In the 1st full paragraph, line 1, after the phrase: "After discussion on the procedure for making motions," add:

which included discussion by Ms. Sheldon of Mr. Gill's continuing refusal to treat Mr. Hochberg with the same courtesy and privilege extended to other Commission members, ... [Mr. Hochberg moved to amend ....].

In the last line on the page, the word "your" should be "you're".

Page 48 After the 2d full paragraph, add the following paragraph:

Mr. Gill stated that he took the floor away from Mr. Hochberg and he suggested to Mr. Hochberg that these kinds of changes be made when "Mr. Hochberg gets to the point when he wants to submit something." Speaking to Mr. Hochberg, Mr. Gill stated that he thinks "it's much more important that we not allow you to keep jumping in, stirring things up, getting them mixed up and then we don't know what we're doing." Whereupon Mr. Hochberg called for the vote for the third time.

In the 3d full paragraph, right after the words "Dr. Stauffer", insert the word "then" before "cited".

At the end of the 3d full paragraph, add:

Whereupon Mr. Gill said ok.

At the beginning of the 4th full paragraph, delete "Ms." and add the following:

In response to an inquiry from Ms. Kreidman, Mr. ...

[Hochberg reasoned that ...]. Mr. Gill said to insert it in the minutes.

**Page 54** In paragraph 2, line 4, after the sentence ending in "those minutes." delete the words "He added that because" and add the following:

Mr. Gill commented that this was Mr. Hochberg's circular motion again, and Mr. Hochberg denied that the motion was circular pointing out that we [the minority Commissioners] actually just learned that ... [there had been ex parte ...].

After the 3rd full paragraph, add the following paragraph:

Mr. Gill suggested that Mr. Hochberg mimeograph this motion and insert it for every topic so we won't have to have her [Ms. Martin] write it all down.

**Page 55** After the 2d full paragraph add the following paragraphs:

Mr. Hochberg stated that Dr. La Croix backed away from his written paper when confronted with Dr. Ghali in the room and admitted that he didn't do an economic analysis.

Dr. Stauffer stated that was not his recollection.

Mr. Hochberg pointed out that it's a shame we didn't go over the minutes.

Dr. Stauffer insisted that we have Dr. La Croix's nine-page testimony and that he's never withdrawn or amended it.

Mr. Hochberg stated that the amended testimony came in the day before Dr. Ghali's testimony. He presented the amended testimony before Dr. Ghali presented his testimony. Dr. La Croix did not know Dr. Ghali was going to be at the meeting.

Mr. Gill suggests that if we have something in writing submit it, and Dr. Stauffer said if Dr. La Croix had secretly withdrawn this, Dr. Stauffer is unaware of it.

Change the 4th paragraph to read:

Mr. Hochberg and Dr. Stauffer discussed and disagreed regarding the evaluation of the lump sum distributions and ordinary and accidental death benefits. Dr. Stauffer said he stood by his interpretation.

In the 7th paragraph, line 2, after the words "wished to appeal.", add the following sentence:

Mr. Gill stated that, as usual, Mr. Hochberg was "popping off and causing delay".

Page 57 In paragraph 3, line 2, add the following to the end of the sentence which presently ends "the statute.":

and no statute was identified.

In the last paragraph on the page, line one, after the word "definition" add the word "of"....

Page 58 Paragraph 1, line 3, after the words "major benefit" add the word "because"....

Paragraph 3, change the paragraph to read:

Mr. Hochberg said the economists were telling us the difference between the individual and the community is the "economic value".

In paragraph 5, lines 2 and 3, delete "Mr. Hochberg and Ms. Sheldon voting aye,"

Page 61 In paragraph 4, line 2, the last word "meats" should be "meets".

Page 62 In the 4th full paragraph, line 1, the word "move" should be "moved".

In the 6th full paragraph, lines 2 and 3, the word "hawaiian" should have a capital "H".

In the 7th full paragraph, line 1, 2d sentence, should read "Dr. Ghali "did" not....

In the 7th full paragraph, line 3, the word "hawaiian" should be capitalized.

Page 63 In the 1st paragraph, line 1, the word "hawaiian" should be capitalized.

Page 69 In the 7th paragraph, line 2, the word following the word "that" should be "in" same-sex....

In the 7th paragraph, line 4, the word "staying" should be "stay". Also, at the end of the paragraph before the period add: and the children usually go to the biological parent.

Page 70 In 2d paragraph, line 3, the word "it" should be inserted



between the words "and" and "would".

In 3d paragraph, line 2, the word "know" should be "known".

In 4th paragraph, line 1, the word "in" should be inserted between the words "believes" and "custody".

Change paragraph 6 to read:

Ms. Sheldon believes the only time they would need a parenting agreement is if they were same sex couples, and the parenting agreement would be irrelevant because the child would normally go to the biological parent. If it should be determined that the best interest of the child would be to remain with the non-biological parent, that would happen without a parenting agreement.

Page 73 At the end of the 3d paragraph, insert the following:

are afforded an opportunity to be heard regarding the extremely controversial and important matters before this Commission.

Page 79 In the 1st full paragraph, the sentence "Mr. Hochberg moved that section "b" read "besides....." should be changed to read:

Mr. Hochberg moved that the section at the beginning of Substantial Benefit #8 which begins "besides the central core benefits..." be changed to read "besides the core benefits that come from the power to enforce failed internal commitments..." Ms. Sheldon seconded.

Page 80 In the 4th paragraph, line 1, the word "was" after the word "how" should be deleted.

Page 81 In the 3d paragraph, line 1, the number "9" should be "8".

In the 6th paragraph, line 3, the word "HIT" should be "HIV".

Page 82 In 5th paragraph, line 4, the words "reminded that" should be "reminded the".

Page 84 In 1st full paragraph, line 3, change "Mr. Gill's rules of order did not apply" to "Mr Gill did not change the rules as the commission goes along."

Page 87 In 1st full paragraph, line 1, the word "move" should be "moved".

**Page 100** In the 1st paragraph, line 3, the word "than" should be "then".

**Page 103** In 1st paragraph, line 1, the word "page" should be deleted.

In 3d paragraph, last line, add the word "say" between the words "didn't" and "it".

In 4th paragraph, line 1, add the word "he" between "if" and "could".

In 4th paragraph, line 2, replace the words "except for" with "even without the" so that the sentence reads: "Ms. Sheldon clarified that even without the religious school, most people believe that the conduct is immoral."

Amendments to the the minutes of 10/25/95

**SUBSTANTIVE CHANGES:**

Page 9.

Third full paragraph starting "His testimony started..." add at the end of the second to last sentence "that it errs." So it reads, "So, it's only after the point where the opinion finds that there is no fundamental right to same-sex marriage that it errs."

Page 12. - Add to the end of the text the following:

"During Mr. Coleman's explanation of the factual situation versus the legal situation of same-gender "families" in Hawaii, Mr. Hochberg offered that heterosexual unmarried couples with biological children are not recognized as families either because we don't have common law marriage. Mr. Coleman replied that factually, they are still families too, even if the law doesn't recognize them. Ms. Sheldon asked if domestic partners would be included in the domestic violence laws, where if police were called to the scene, one of them would go to jail? Mr. Coleman replied "Naturally. It would be the same."

Mr. Coleman referred to the numerous statutes in the list produced by the Legislative Reference Bureau that indicate that benefits exist and Mr. Hochberg interrupted to say that the Commission has not reviewed the statute list. The Chair asked Mr. Hochberg to allow Mr. Coleman to continue.

Mr. Coleman responded to what he has heard today regarding just keeping the status quo. He pointed out that national statistics of opinion polls reveal that 30% are absolutely against it and would like to re-impose criminal penalties, and there's 30% of the public that support the legalization of same-sex marriage and 40% say that some kind of reform is necessary but they don't feel comfortable with the solution of same-sex marriage. Mr. Hochberg interpreted Mr. Coleman's 30-30-40 breakdown to make him appear in the middle, and stated that no one in Hawaii has suggested criminalizing sodomy. Mr. Coleman clarified that in national polls those people that are christian conservatives support criminalization of homosexual relationships. Mr. Coleman quoted a Los Angeles Times poll where one of the questions asked was how do you label yourself? Mr. Coleman said that he would provide the exact poll when he returned to the mainland.

When Mr. Coleman had finished his presentation, Mr. Hochberg suggested that there could be another suggested action on the

Attachment 3

list that would make it very clear that Baehr v. Lewin is overturned and that would be a constitutional amendment that prohibited any marriage except between one man and one woman. Mr. Coleman agreed that would be sixth option, but he commented that he did not believe the votes were there in the Legislature for that option. Mr. Britt offered that there could be a federal Constitutional amendment, but that isn't going to happen either.

Dr. Stauffer, referred to one of his articles where he stated there are one thousand statutes that are driven by state-issued marriage certificates and as the Commission does not have the time or money to investigate this, do you have an article where these are enumerated? Mr. Coleman clarified that there are 1499 hits under a westlaw search of marriage and spouse and further clarified that most likely the figure is closer to hundreds because one statute may use the terms more than once.

The Chair asked Mr. Coleman if he had a format for the comprehensive domestic partnership law and Mr. Coleman volunteered to send his recommendations upon return to the mainland, and it would be less than about two pages.

He volunteered that his domestic partner and he will be moving to the Big Island in January, and that he actually has a stake in the outcome. Mr. Hochberg commented that brings to mind several questions, how long have you been working on this issue in Hawaii? Mr. Coleman replied that he has been following the issue from the summer of 1993, when Representative Tom held informational hearings on the neighbor islands. He attended the one on the Big Island while on vacation. Mr. Hochberg asked how come he couldn't find any information on Spectrum Institute or yourself as an author? The only listing was an interview published in the Los Angeles Times in September of 1981, is your organization a ghost and is this just a pet project of yours after 22 years of lawyering? Mr. Coleman responded, "No." He further stated that the Spectrum Institute has worked with the State of California on these and other similar issues. Mr. Hochberg said he could do the same thing in Hawaii, incorporate and have a pet project, just be honest. Mr. Coleman stated that he could not vouch for Mr. Hochberg's search, and continued to say that the Spectrum Institute has two primary projects. Ms. Kriedman interrupted, stating that she did not feel comfortable having Mr. Coleman substantiate his organization. Dr. Stauffer reminded the Commission that Mr. Coleman has travelled from the mainland at no cost to the Commission to provide his testimony and that we should respect that, even if the Spectrum Institute is not a big organization. Mr. Coleman confirmed that it is a small non-profit organization. Mr. Hochberg disagreed with Dr. Stauffer and stated that it is his right to know, and further stated he believed the Commission didn't care because Mr. Coleman's testimony fit into the majority's agenda.

Mr. Hochberg asked if Mr. Coleman if he was familiar with Martine Rothwell, she wrote a book called the Apartheid of Sex? Mr. Coleman was not. Mr. Hochberg asked if Mr. Coleman's view of full equality was similar to hers? He stated her position to be: Martine Rothwell was born Martin Rothwell, after being married and having two kids and a career as a lawyer for twenty years and making a lot of money in satellite law, got a little bored. He and his wife thought it would be interesting to live the second half of their lives as a same-sex couple and he went and got a sex-change operation. Now the ABA parades them around as a lesbian couple. Is that the goal of full equality? Mr. Coleman responded that under current law if someone has a sex-change operation they are treated..Mr. Hochberg interrupted to say that was not his question, he clarified that his question was is your institute, your movement that is seeking the full equality, that is what we're talking about? Mr. Coleman replied he thought it sounds like that's what Mr. Hochberg was talking about. The Chair asked Mr. Hochberg to clarify his question.

Mr. Hochberg continued, if you have domestic partnership and two men are in prison, how do you deal with that problem, are they allowed to have domestic partnership marital relations together? They are allowed to have relations none of the other heterosexual prisoners do. Mr. Coleman disagreed. As Professor Van Dyke said with regard to prison security, there are more strict guidelines that are allowed to keep order. Criminals are treated differently.

Mr. Hochberg confirmed that Mr. Coleman is suggesting a simple 2-page piece of legislation stating why this is a good idea and the domestic partnership status equals the "spouse" status wherever they appear in the Statutes. Mr. Michaels, the First Deputy Attorney General said when he was here that that law would be unconstitutional vague and you would have to change every statute. Mr. Coleman replied that the legislature can do that. Simply reference those statutes, if you have to reference the specific statute you just do it.

Both Mr. McGivern and his wife agreed to testify in time for a break at noon. He read his testimony that summarizes that he believes that he didn't believe that any testimony received by the Commission would sway their opinions or change the ultimate result that would lead to domestic partnership law. His written testimony is attached.

Mely McGivern stated that she was a guest of Toni Sheldon and feared that her birthplace is close to becoming a Sodom and Gommorah of the World. She believes that the action of the Commission could lead to same-sex marriage or domestic partnership. Her written testimony is attached.

There were two comments from the public. The first speaker was Laurie McNamara. She stated that she didn't judge lesbians but I believe that if these laws are passed, you'll have people doing it for financial benefit, for example, military housing and people with children from previous marriages will get together because it will be a lot cheaper and the government will pay for it. It will be very expensive.

The second speaker was Sherry Silva. She stated that she didn't have any specific reasons other than she was Christian and didn't think it was right. She quoted the State motto and added that it used to mean something. She did not want to impose the death penalty on people who entered into this kind of relationship but she did not approve and felt that being responsible for her children, she would find it difficult to have her children play with the children of same-sex couples. She commented that she wanted a moral environment for her kids.

Subject: Commission votes for same-sex marriage r  
Date: 12/11 06:36 PM ET

Subject: Commission votes for same-sex marriage rights

>Return-Path: <marriage-owner@abacus.oxy.edu>  
>Date: 09 Dec 95 14:04:49 EST  
>From: Morgan <71020.1564@compuserve.com>  
>To: Bob Stauffer <rstauffer@mcimail.com>, Charles Baldwin  
<chasba@tenet.edu>,  
> "Frank's CompuServe" <72000.3631@compuserve.com>,  
> "INTERNET:KLewis@ix.netcom.com" <KLewis@ix.netcom.com>,  
> Kuulei Ihara <kuulei@bishop.bishop.hawaii.org>,  
> Marriage List <marriage@abacus.oxy.edu>,  
> Richard Curry <76263.1714@compuserve.com>,  
> Roger Takabayashi <roger\_takabayashi@dole.doe.hawaii.edu>  
>Subject: Commission votes for same-sex marriage rights  
>Sender: marriage-owner@abacus.oxy.edu  
>Precedence: bulk

>  
> News You Can Use

>>From the Commission on Sexual Orientation and the Law

>  
>Well, it shouldn't be too surprising to those of you who have been keeping  
up  
>with the issue: the Commission on Sexual Orientation and the Law FINALLY  
voted  
>to accept the report of the Commission on December 8, 1995. This is a day  
later  
>than originally planned.

>  
>On December 7, Jim Hochberg, Rutherfordite (rhymes with "sodomite"), was  
able to  
>stall the vote citing a need to "review the report that we've never seen  
until  
>just this afternoon." Of course we've all had the draft Report since  
November

>27. It turns out this was a ploy for him to go to Joe Souki, the man who  
>appointed him to the Commission and Speaker of the House of  
Representatives, and  
>cry over the fact that the Chair, Tom Gill, would not let him add ANOTHER 25  
>page appendix to the report. This was well after the deadline for the  
>introduction of new materials to be included in the Report had passed. The  
>proposed appendix was mostly material by long-time anti-gay propagandist  
Charles  
>Socarides.

>  
>Speaker Souki dashed off a letter to members of the Commission admonishing  
them  
>for not making a "complete report" and thereby questioning its ultimate  
>credibility. This effort by Hochberg to discredit the Report and the  
Commission  
>has been consistent with his strategy all along.

>  
>At the December 8 meeting we came down 5 to 2 to endorse the findings and

Attachment 4

>recommendations of the Report after Hochberg and Sheldon haggled (again)  
 over  
 >how there were "really two reports" and objected to how their entries in the  
 >Table of Contents had been reduced from nearly a page to one line: Minority  
 >Opinion.

>  
 >On a more cheerful note Pam Martin, our Legislative Reference Bureau staff  
 >member, showed us a sample of how the final bound copy of the report would  
 look.

>After the printing job goes out to bid, the final copy will have a run of  
 only

>500 copies (so get your order in now). It will be soft bound and have a  
 (gasp!)

>lavender cover. Pam said that was the only color they hadn't used for a  
 report

>cover yet so we were stuck with it. I know this will be a big  
 disappointment

>for many ;-)

>  
 >If you are interested in copies of the Report you should contact:

>  
 >Legislative References Bureau

>State Capitol

>415 S. Beretania Street

>Honolulu, HI 96813

>  
 > (808) 587-0662

>or FAX:

> (808) 587-0681

>  
 >It's the perfect holiday gift (albeit Christmas for some and Halloween for  
 >others).

>  
 >I would like to thank all of you who have given your support to the  
 Commission

>to ensure that promise of America, freedom and justice for all, can come a  
 >little closer to reality.

>  
 >Respectfully,

>  
 >Morgan Britt, Commissioner (mbritt@pixi.com)

>State of Hawaii,

>Commission on Sexual Orientation and the Law

>  
 >  
 >  
 >  
 >\*\*\*\*\*

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 >To send a message to the entire list "marriage", email  
 marriage@abacus.oxy.edu

>  
 >To unsubscribe, send a message 'unsubscribe marriage' to  
 MAJORDOMO@abacus.oxy.edu.

>To subscribe, send a message 'subscribe marriage' to  
 MAJORDOMO@abacus.oxy.edu.

>\*\*\*\*\*

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>





**Commission on Sexual Orientation and the Law**  
**Legislative Reference Bureau**  
**State Capitol, Room 446**  
**Honolulu, HI 96813**

**Phone: (808) 587-0666      Facsimile: (808) 587-0681**

---

*Thomas P. Gill, Chairperson*  
*Lloyd James Hochberg, Jr.*  
*Robert H. Stauffer*

*Morgan Britt*  
*Nanci Kreidman*

*L. Ku'umeaaloha Gomes*  
*Marie A. "Toni" Sheldon*

**DRAFT MINUTES OF THE MEETING HELD**  
**THURSDAY, JANUARY 4, 1996**  
**(Continued to January 10, 1996)**

**I. Call to Order**

The eighth meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:15 a.m., at the State Capitol Building, Room 225, 415 South Beretania Street, Honolulu. Members present were:

Thomas P. Gill, Chairperson  
Morgan Britt  
Lloyd James Hochberg, Jr.

Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

L. Ku'umeaaloha Gomes was excused.

Ms. Pamela Martin of the Legislative Reference Bureau also attended the meeting.

Mr. Hochberg and Ms. Sheldon stated that their participation in today's meetings do not waive any claims in the civil complaint filed against the Governor, the Chairperson, the majority members of the Commission and the Acting Director of LRB. Mr. Hochberg and Ms. Sheldon requested that a copy of that complaint, Circuit Court of the First Circuit, Civil Complaint No. 95-4675-12, be attached to the minutes. It is attached as Attachment 1.

Ms. Martin noted that there were three handouts: (1) testimony submitted by Ward Stewart (attached at page T-1); (2) the Draft Minutes of the Meeting of December 7, 1995; and (3) suggested amendments by Dr. Stauffer to the minutes of October 25, 1995.

**II. Approval of Minutes**

The minutes of October 25, 1995 were addressed first. The Commission left off at page 30 of Ms. Sheldon's amendments. It was decided to review Dr. Stauffer's amendments to that point and then continue on a page-by-page basis. It was decided to work from the draft that was passed out. It is the original Draft minutes and Dr. Stauffer's amendments are written throughout the text and Ms. Sheldon's amendments refer to the pages of that draft.

Mr. Stauffer's amendment to add "because they were available" on page 1 was opposed by Mr. Hochberg and Ms. Sheldon.

Dr. Stauffer then moved to include the phrase in the minutes. Mr. Britt seconded the motion. After discussion, the motion was passed with the Chairperson, Mr. Britt, Ms. Kreidman, and Dr. Stauffer voting aye, and Mr. Hochberg and Ms. Sheldon voting nay.

The amendments proposed by Dr. Stauffer on pages 5 and 6 were withdrawn.

All other amendments proposed by Dr. Stauffer, on pages 26, 28, 33, 34, 35, and 37 were not objected to, and so adopted.

Ms. Sheldon moved to include her amendment on page 37. (A copy of Ms. Sheldon's amendments is attached as Attachment 2.) Mr. Hochberg seconded.

Mr. Britt spoke against the motion because the amendment did not add anything to the minutes. Ms. Sheldon spoke in favor commenting that the amendment reflects what happened. Mr. Hochberg called for the vote.

The motion did not pass with Mr. Hochberg and Ms. Sheldon voting aye, Mr. Britt voting nay and the Chairperson, Ms. Kreidman and Dr. Stauffer abstaining.

There was no objection to Dr. Stauffer's amendments on pages 39-40.

Ms. Sheldon then moved to have her amendment on page 41 accepted. Mr. Hochberg seconded the motion. After discussion, the motion passed, with Mr. Hochberg, Ms. Kreidman, Ms. Sheldon and Dr. Stauffer voting aye and Mr. Britt and the Chairperson abstaining.

Ms. Sheldon had three proposed amendments to page 43. Each one was addressed separately. There were no objections to the first and second amendments. There was objection to the third suggested amendment on page 43.

A motion to accept the third suggested amendment was made by Ms. Sheldon and seconded by Mr. Hochberg. During the discussion Dr. Stauffer expressed concern about the type of additions the Commission is taking time to insert. He does not question their accuracy but objects to taking selected one-sided quotations out of context, because indirectly that creates an inaccurate description of the meeting. Ms. Kreidman agreed with Dr. Stauffer and spoke in opposition of going along with these kinds of additions. Mr. Hochberg disagreed.

The motion did not pass with Mr. Hochberg and Ms. Sheldon voting aye; the Chairperson, Mr. Britt, and Ms. Kreidman voting nay; and Dr. Stauffer abstaining.

Dr. Stauffer added the phrase "in his opinion" to his amendments on page 45 and 48 and there was no objection. There was no objection to his amendment on page 46.

Ms. Sheldon added the phrase "in her opinion" to her amendment on page 47 and there was no objection.

Ms. Sheldon's four amendments to page 48 were taken separately. There was objection to the first amendment, no objection to the second amendment, the third amendment was withdrawn, and the fourth amendment was not objected to when Ms. Sheldon voluntarily withdrew the last sentence in that amendment.

Ms. Sheldon moved to have her first amendment on page 48 accepted. Mr. Hochberg seconded the motion. After discussion and a vote, the motion did not pass with Mr. Hochberg, and Ms. Sheldon voting aye; the Chair and Mr. Britt voting nay; and Ms. Kreidman and Dr. Stauffer abstaining.

Dr. Stauffer withdrew his amendment on page 49 and asked to have the testimony from the Quakers inserted in the minutes of today. The testimony of the Quakers follows:

#1:

The following minute [i.e., policy statement] was approved by Pacific Yearly Meeting [the regional organization of Quakers including California, Hawaii, and some other areas, including Mexico City] on Eighth-Month 4, 1995.

"A Loving Response to Hostility Against Sexual Minorities"

Background

Within the territory comprising our Yearly Meeting there are Friends [i.e., Quakers] and others who risk hostility, verbal abuse and physical violence because they are, or are perceived to be, members of sexual minorities (for example, lesbians, gays, bisexuals). There are growing campaigns to legalize discrimination based on sexual orientation.

All hostility separate us from God and from each other. As Friends, we seek a response that arises from the Light, and reaches out and cares for the needs and human dignity of those affected on all sides of this conflict.

Action Minute

Pacific Yearly Meeting of the Religious Society of Friends endorses all nonviolent efforts to establish and protect the civil rights of all persons despite their sexual orientation. We oppose all legislation or policy which disparages sexual minorities or abridges their basic constitutional rights.

#2:

The following minute was approved at Friends for Lesbian & Gay Concerns on Seventh-Month 6, 1995.

It is a fundamental to Friends' faith and practice that we affirm the equality and integrity of all human beings. Equally, we hold that the purpose of recognizing and affirming committed relationships is to strengthen our families and communities.

Therefore, it is our belief that it is consistent with Friends' historical faith and testimonies that we practice a single standard of treatment for all committed relationships.

Given that the State offers legal recognition to opposite-gender marriage and extends significant privileges to couples who legally marry, we believe that a commitment to equality requires that same-gender couples be granted the same rights and privileges.

Therefore, we believe that the State should permit gay and lesbian couples to marry and share fully and equally in the rights and responsibilities of marriage.

We invite Monthly Meetings [i.e., individual congregations], Yearly Meetings [i.e., regional divisions] and Quaker Organizations to consider a minute of support for legal recognition of same-gender marriages, and to communicate this support to their elected representatives.

Because of pending legislation and litigation, we urge a timely response.

The Commission took a recess at 10:27 and reconvened at 10:39. During the recess Ms. Loree Johnson submitted written testimony which is attached to these minutes at page T-4.

Two amendments, one proposed by Dr. Stauffer and one by Ms. Kreidman, were accepted as there were no objections.

The Commission had started to address Ms. Sheldon's amendment on page 54 when the Alarm System in the Capitol required the Commissioners to leave the building. Before it could be determined that it was a test, the Chair was forced to recess the meeting and called to reconvene for Wednesday, January 10, at 9:00 a.m in a room to be announced.

#### January 10, 1996

The meeting was reconvened by the Chairperson at 9:00 a.m in Room 224, State Capitol, on Wednesday, January 10, 1996. The members present were:

Thomas P. Gill, Chairperson  
Morgan Britt  
Ku'umeaaloha Gomes

Nanci Kreidman  
Marie A. "Toni" Sheldon  
Robert H. Stauffer

Lloyd James Hochberg, Jr. was excused.

Ms. Pamela Martin of the Legislative Reference Bureau also present.

Ms. Martin confirmed that the members had received the new edited draft version of the October 25, 1995 minutes which contained all the accepted changes to date and the remaining proposed changes except for those proposed by Ms. Sheldon on page 54 of the original, now page 45. Ms. Martin also stated that she had paraphrased certain proposed amendment language on page 55.

Ms. Martin had prepared a similar edited draft version of the November 8, 1995 minutes that included the proposed amendments as requested by Dr. Stauffer. Ms. Sheldon's substantive amendment had been withdrawn at an earlier meeting.

The Chairperson reviewed the items on the agenda. The unapproved minutes to date include October 25, 1995, November 8, 1995, November 22, 1995, and December 7, 1995. The members have had ample time to review them. In the interests of time the Chairperson asked if the Commission could just make any substantive comments regarding changes and leave all spelling and grammatical errors to the LRB staff.

Ms. Sheldon pointed to page 49 on the new edited version and requested that the statement, "The testimony of Dr. Ghali was not being considered" be added. Dr. Stauffer's amendments had deleted it. There was no objection and it was adopted.

She also pointed to page 45 on the new edited version and asked to have the phrase "his memos" changed to read "his lists (referring to the memos)". There was no objection and it was adopted.

Dr. Stauffer pointed out that a vote was missing for a motion that was on the table at the bottom of page 13. LRB staff said they would consult the tape and add it in.

Dr. Stauffer moved to accept the Minutes of the Meeting Held Wednesday, October 25, 1995, as presented and as amended above. Ms. Kreidman seconded the motion. The motion passed unanimously.

The Chair took up the Minutes of the November 8, 1995 meeting. Mr. Britt presented two amendments to page 4, one in paragraph 5 and one paragraph 7. The paragraph 5 amendment was to add "represented herself". There was no objection and it was adopted. The amendment in the seventh paragraph was "(See attached memorandum of Thomas Aitken)" there was no objection and in addition the Thomas Aitken memorandum was attached as Attachment 1 to the Minutes of November 8, 1995.

Ms. Kreidman made a motion to accept the Minutes of the Meeting Held November 8, 1995 as amended. The motion was seconded by Ms. Gomes. The motion passed unanimously.

The Chair then addressed the Draft Minutes of the Meeting held November 22, 1995. Ms. Sheldon pointed to the bottom of the second page in the ninth full paragraph and asked to replace "that explains that" with "where in his interpretation the". There was no objection and so it was adopted.

On page 7, in the second full paragraph, a reference to the LRB prepared "Suggested Incorporation of Amendments to Dr. Ghali's testimony" needs to be added, i.e. "(Attached as Attachment 4.)" There was no objection and so it was adopted.

On page 12, Ms. Sheldon pointed out in the second and last paragraphs the words "objects to supports" appeared. LRB staff confirmed that in both instances it should be simply "objects to". There were no objections and so it was adopted.

Ms. Kreidman moved to accept the Minutes of the Meeting Held November 22, 1995 as amended. Dr. Stauffer seconded. The motion passed unanimously.

The Chair then brought the Draft Minutes of the Meeting Held December 7, 1995, up for discussion. No substantive amendments were made, by the Commission members. LRB staff pointed to some errors that had been corrected.

Mr. Britt moved to accept the Minutes of the Meeting Held December 7, 1995. Dr. Stauffer seconded. The motion passed unanimously.

The Chair then stated that the only minutes left to be approved were the minutes of the meeting being held. He expressed concern that it would be a never-ending battle having another meeting to approve the minutes of the meeting that approved the minutes, etc. Ms. Martin stated that the law did not require the minutes to be approved.

Dr. Stauffer then made a motion to approve the Minutes of the Meeting Held January 4, 1996, subject to the Commissioner's review and comments of the draft minutes. Mr. Britt seconded. During discussion it was decided that if there were any substantive changes that LRB staff could not confirm then a another meeting could be called to resolve that, otherwise, upon review by the Commissioners, the minutes will be deemed accepted and adopted, including any comments. The motion passed unanimously.

Having no other business, the Chair entertained a motion from Mr. Britt to adjourn. The motion was seconded by Dr. Stauffer. The motion passed unanimously.



**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND FOR ATTORNEY FEES**

Plaintiffs Marie A. Sheldon and Lloyd James Hochberg, Jr., by and through their attorney, file this Complaint for Declaratory and Injunctive Relief and for Attorney Fees against Benjamin Cayetano, in his official capacity as Governor of the State of Hawaii; Thomas P. Gill, in his official capacity as chairman of the Commission on Sexual Orientation and the Law; Morgan Britt, L. Ku'umeaaloha Gomes, Nanci Kreidman, and Robert Stauffer, in their official capacities as members of the Commission on Sexual Orientation and the Law; and Wendell K. Kimura, in his official capacity as Acting Director of the Legislative Reference Bureau.

**A. PARTIES**

1. Plaintiff Marie A. Sheldon ("Sheldon") is, and at all times relevant hereto was, a resident of the State of Hawaii. She was appointed by defendant Benjamin Cayetano to serve as a member of the Commission on Sexual Orientation and the Law (the "Commission"), which was created pursuant to Act 5, Session Laws of Hawaii 1995 ("Act 5").

2. Plaintiff Lloyd James Hochberg, Jr., ("Hochberg") is, and at all times relevant hereto was, a resident of the State of Hawaii. He was appointed by defendant Benjamin Cayetano to serve as a member of the Commission.

3. Defendant Benjamin Cayetano ("Cayetano") is, and at all times relevant hereto was, Governor of the State of Hawaii. He is being made a defendant in this action in his official capacity as Governor of the State of Hawaii.

4. Defendant Thomas P. Gill ("Gill") is, and at all times relevant hereto was, Chairman of the Commission. He was appointed to the Commission by Cayetano, and he is being made a defendant in this action in his official capacity as Chairman of the Commission.



5. Defendants Morgan Britt, L. Ku`umeaaloha Gomes, Nanci Kreidman, and Robert Stauffer are, and at all times relevant hereto were, members of the Commission. They were appointed to the Commission by Cayetano, and they are being made defendants in this action in their official capacities as members of the Commission.

6. Defendant Wendell K. Kimura is, and at all times relevant hereto was, Acting Director of the Legislative Reference Bureau of the State of Hawaii ("LRB"). He is being made a defendant in this action in his official capacity as Acting Director of the LRB.

## **B. JURISDICTION**

7. This Court has jurisdiction over this action pursuant to sections 92-11, 92-12(b) and (c), 603-21.5(3), and 603-21.7(a)(3) of the Hawaii Revised Statutes, as amended.

## **C. STATEMENT OF THE CASE**

8. In its 1995 session, the Hawaii State Legislature (the "Legislature") adopted Senate Bill 888, which was signed into law by Cayetano on March 24, 1995. This legislation became Act 5.

9. Act 5 repealed Section 6 of Act 217, Session Laws of Hawaii 1994 ("Act 217"). Act 217 created an eleven-member Commission on Sexual Orientation and the Law and charged that commission to perform certain functions. Act 5 established a completely new seven-member Commission on Sexual Orientation and the Law. The purpose of the Commission, as set out in Act 5, is to

- (1) Examine the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples;
- (2) Examine the substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples; and

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

10. Act 5 directs the Commission to submit a report of its findings to the Legislature no later than twenty days prior to the convening of the 1996 regular session. By a letter dated December 15, 1995, Gill announced that the report would be published and distributed to the legislature and the public on or about December 22, 1995. Act 5 further provides that the Commission will cease to exist after July 1, 1996.

11. The seven members of the Commission were appointed by Cayetano. In accordance with Act 5, two of the members were nominated by Joseph Souki ("Souki"), who is Speaker of the House of Representatives of the State of Hawaii, and two were nominated by Norman Mizuguchi ("Mizuguchi"), who is President of the Senate of the State of Hawaii (the "Senate").

12. By separate letters from Cayetano dated August 10, 1995, Sheldon and Hochberg were informed that they had been appointed to the Commission. Copies of those letters are attached as Exhibits A and B, respectively. On information and belief, all seven members of the Commission were appointed in the same manner.

13. At no time were the appointments of the Commission members submitted to the Senate for advice and consent; at no time did the Senate advise and consent to the appointments; nor was any oath of office administered to or received from any of the Commission members.

14. The Commission met approximately 25 times between September 13, 1995 and December 13, 1995. On December 15, 1995, the Commission produced a report entitled *Report of the Commission On Sexual Orientation And the Law* dated December 8, 1995 (the "Report"). The Report was purportedly the material included in the draft circulated to Commission members on

December 7, 1995, subject to correction of such things as typographical errors and misnumbering of footnotes and appendices.

15. On or about December 15, 1995, Gill sent "advance copies" of the Report to Souki and Mizuguchi. In those "advance copies," the portion of the Report which had been prepared by Sheldon and Hochberg (the "Minority Report") had been altered, without Sheldon's and Hochberg's knowledge and consent, from the form of the Minority Report which had been approved by a 5-2 vote of the Commission on December 8, 1995.

16. In various places in the Report, the Commission quotes from and cites to purported minutes of meetings held in October, November and December of 1995. However, those minutes had not been reviewed or approved by the Commission prior to the completion of the Report, and some of those minutes have still not been reviewed and approved by the Commission. The Commission has scheduled a meeting on January 4, 1996, to complete the adoption of the minutes of Commission meetings.

17. From the outset, the five-member majority (the "Majority") of the Commission, consisting of Gill, Britt, Gomes, Kreidman, and Stauffer, steered the work of the Commission away from the charge contained in Act 5 and drafted the Report so as to invalidate the State of Hawaii's defense of section 572-1 of the Hawaii Revised Statutes, as amended, in *Baehr v. Miike*, Civil No. 91-1394, which is pending before the Circuit Court of the First Circuit, State of Hawaii. The Hawaii Equal Rights Marriage Project, a homosexual marriage lobbying group, announced on or about August 18, 1995, that its volunteers would work intensively with the Commission and that the Commission's recommendations would likely be ignored by the legislature but would be useful in the pending homosexual marriage litigation.

18. As drafted by Gill and the Majority, the Report is a response to the Hawaii Supreme Court opinion in *Baehr v. Lewin*, 74 Haw. 530 (1993), rather than a meaningful attempt to carry out the charge set out in Act 5. Thus, the Commission has failed to fulfill its duty under Act 5.

19. On or about November 1, 1995, Gill and the Majority denied the request of Father Chip Wheeler to testify at a meeting of the Commission. Father Wheeler was physically present at the meeting but was denied an opportunity to speak by a vote of 5-2. Gill and the Majority all voted to deny Father Wheeler the opportunity to testify.

20. Similarly, Gill and the Majority denied Sheldon's and Hochberg's request that Dr. Dallas Willard, Dr. Joseph Nicolosi, Professor Richard Duncan, and Roger Magnuson, Esq., (all of whom reside and work on the Mainland) be allowed to present testimony to the Commission by telephone. These individuals are nationally-recognized experts regarding the public policy reasons to extend or not to extend to same-sex couples whatever economic benefits are conferred by law upon married couples.

21. The Commission circumvented the statutory notice requirements relating to the Commission's December 6, 1995 meeting, which was to be set aside for receiving public comments on the draft of the Report which was published on or about November 27, 1995. On November 16, 1995, the LRB had, in accordance with section 92-7 of the Hawaii Revised Statutes, as amended, filed with the Office of the Lieutenant Governor of the State of Hawaii (the "Lt. Governor"), the Commission's Notice of Meeting and Agenda for the November 22, 1995 meeting. That Agenda did not call for the public to give testimony. On December 4, 1995, the LRB informed the Commission that it had failed to file with the Lt. Governor's office the notice of the Commission's long-awaited December 6, 1995 meeting within the time limit prescribed by section

92-7. Thus, the notice provided that the meeting for receiving public response to the draft Report would be held on December 7, 1995.

22. At the December 4 meeting, the LRB recommended that the Commission go forward with the December 6 meeting by amending the agenda of the November 22 meeting to include receipt of public testimony regarding the November 27, 1995 draft of the Report, and to treat the December 6 meeting as a continuation of the November 22 meeting. The Commission adopted the LRB's recommendation.

23. The December 6 meeting went forward under the amended agenda of the November 22 meeting, notwithstanding that the fact that the Lt. Governor's office notified telephone inquirers that the public comment meeting would be held on December 7, 1995, pursuant to the official notice published by the LRB on behalf of the Commission.

24. The amending of the November 22, 1995 meeting agenda on December 4, 1995 to permit consideration of additional information at the meeting to be held on December 6, 1995, was accomplished pursuant to a pattern of conduct engaged in by Gill and the Majority throughout the proceedings between the October 25, 1995 and December 13, 1995 Commission meetings.

25. During this period, the noticed meetings were not adjourned at the conclusion of the meetings as noticed, but instead were "recessed" to other dates and times, without subsequent public notice.

26. The Commission failed to keep written minutes of all meetings, and Gill and the Majority repeatedly refused to have included in the minutes information necessary to, among other things, record a true reflection of the matters discussed, and the views of participants expressed, at Commission meetings.

27. Gill, the Majority, and the LRB failed to make minutes available within thirty days as required by section 92-9 of the Hawaii Revised Statutes, as amended, despite many requests by Sheldon and Hochberg that the minutes be prepared by the LRB and adopted by the Commission.

28. Throughout the many meetings of the Commission, Gill and the Majority refused to discuss viewpoints which varied from the Majority's, but they assured Sheldon and Hochberg that they would be permitted to publish their views in the Minority Report, which would not be edited or otherwise modified by Gill or any other member of the Majority. However, in connection with producing the final Report (as embodied in the "advance copies" referred to above), Gill, the Majority, and/or the LRB deleted material from the Minority Report which had been included in prior drafts of the Minority Report. This was done without prior notice to Sheldon and Hochberg; Gill, the Majority, and the LRB also unilaterally refused to include information in the Minority Report which Sheldon and Hochberg had requested be included.

29. On December 7, 1995, Gill, the Majority, and the LRB for the first time disclosed the content of the final Report prepared by the Majority, which contained newly-added material in both the text and the Appendix to the Report.

30. When Sheldon and Hochberg saw the new material, they attempted on December 7, 1995, to add four responsive items to the appendix of the Report. Gill and the Majority voted to prohibit Sheldon and Hochberg from adding the responsive material.

31. By letter dated December 7, 1995, Souki requested that the Commission render a complete report to the Legislature, fully addressing both sides of this important issue, and that they include the responsive material which Sheldon and Hochberg had requested be added to the appendix to the Report. Gill and the Majority refused Souki's request.

32. On or about December 8, 1995, the Majority caused to be published nationwide on the Internet an announcement that the Report was about to be published and that interested parties should be vigilant about ordering copies of the Report, as there would be a limited number available for distribution. The Internet announcement also solicited support for the Majority's position in the Report. Other announcements regarding the progress of the work of the Commission have been published on the Internet by the Majority.

**D. COUNT 1: THE ACTIONS OF THE COMMISSION ARE VOID AB INITIO BECAUSE NONE OF THE COMMISSIONERS SUBSCRIBED TO THE CONSTITUTIONALLY-REQUIRED OATH OF OFFICE, AND BECAUSE NONE OF THE COMMISSIONERS WERE APPOINTED WITH THE ADVICE AND CONSENT OF THE SENATE**

33. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 32.

34. Section 26-34(a) of the Hawaii Revised Statutes, as amended, provides:

(a) *The members of each board and commission established by law shall be nominated and, by and with the advice and consent of the senate, appointed by the governor.* Unless otherwise provided by this chapter or by law hereafter enacted, the terms of the members shall be for four years; provided that the governor may reduce the terms of those initially appointed so as to provide, as nearly as can be, for the expiration of an equal number of terms at intervals of one year for each board and commission. Unless otherwise provided by law, each term shall commence on July 1 and expire on June 30, except that the terms of the chairpersons of the board of agriculture, the board of land and natural resources, and the Hawaiian homes commissions shall commence on January 1 and expire on December 31. No person shall be appointed consecutively to more than two terms as a member of the same board or commission; provided that membership on any board or commission shall not exceed eight consecutive years.

(Emphasis added.)

35. Article XVI section 4 of the Constitution of the State of Hawaii provides:

All eligible public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as . . . . . to the best of my ability."

As used in this section, "eligible public officers" means the governor, the lieutenant governor, the members of both houses of the legislature, the members of the board of education, the members of the national guard, State or county employees who possess police powers, district court judges, *and all those whose appointment requires the consent of the senate.*

(Emphasis added.) Moreover, Article V section 6 of the Hawaii State Constitution provides, in part, that the "governor shall nominate and, by and with the advice and consent of the senate, appoint *all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law.* If the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

36. Accordingly, since the appointment of Commission members was subject to the advice and consent of the Senate, the Commission members were required by Article XVI section 4 of the Constitution of the State of Hawaii to subscribe to an oath of office prior to commencing Commission work.

37. No oath of office whatsoever, much less the one required by Article XVI section 4 of the Constitution of the State of Hawaii, was subscribed to by any of the members of the Commission.

38. Since the Commission has not operated in accordance with the terms of the Constitution of the State of Hawaii, its work is void ab initio, and this Court should declare all of the actions of the Commission to date, including (but not limited to) the rendering of the Report, to be null and void, and the Court should issue an order permanently enjoining the publication or distribution of the Report or any copies thereof as official government documents. Permanent and



irreparable harm will result to the public if the Report is published under the seal of the State of Hawaii as an official government document.

**E. COUNT 2: THE COMMISSION REFUSED TO ALLOW PUBLIC TESTIMONY BY AN ATTENDEE OF A REGULAR COMMISSION MEETING, IN VIOLATION OF HAWAII REVISED STATUTES SECTION 92-3**

39. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 38.

40. On or about November 1, 1995, Father Chip Wheeler attended a regular Commission meeting and sought permission to offer oral testimony. By a 5-2 vote, Gill and the Majority rejected Sheldon's and Hochberg's request that Father Wheeler be allowed to testify. The reason given at the time was that the November 1, 1995 meeting was a continuation of a previous meeting, at which public testimony had been allowed, and that the Commission was not obligated to afford interested persons a further opportunity to present oral testimony on November 1, 1995.

41. Section 92-3 of the Hawaii Revised Statutes, as amended, provides:

Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5; provided that the removal of any person or persons who wilfully disrupts a meeting to prevent and compromise the conduct of the meeting shall not be prohibited. The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. *The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item.* The boards may provide for reasonable administration or oral testimony by rule.

(Emphasis added.) The terms "boards" and "meeting," as used in section 92-3, are defined in section 92-2. Section 92-2(1) provides that "boards" includes "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions," and section 92-2(3) provides

that "meeting" means "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."

42. Clearly, the Commission's refusal to allow Father Wheeler to testify on November 1, 1995 was a wilful violation of section 92-3 of the Hawaii Revised Statutes, as amended.

43. Section 92-11 of the Hawaii Revised Statutes, as amended, provides that any "final action taken in violation of section . . . 92-3 . . . shall be voidable upon proof of wilful violation. A suit to void any final action shall be commenced within ninety days of the action."

44. The seriousness of the Commission's violation of section 92-3 is emphasized by section 92-1 of the Hawaii Revised Statutes, as amended, which provides:

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of governmental agencies - shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

45. The Commission's flaunting of the provisions of section 92-1 and 92-3 of the Hawaii Revised Statutes, as amended, with respect to Father Wheeler completely undermines the credibility of the Report, and the Report, being the final action taken by the Commission, should be

voided by this Court. Allowing the Report to stand as an official government document in light of the Commission's violation of sections 92-1 and 92-3 with respect to Father Wheeler would irreparably harm the public.

**F. COUNT 3: ON THE ADVICE OF THE LRB, THE COMMISSION REFUSED TO ALLOW MAINLAND EXPERTS TO OFFER PUBLIC TESTIMONY BY TELEPHONE RELATING TO THE POLICY QUESTIONS WHICH THE COMMISSION WAS CHARGED TO CONSIDER.**

46. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 45.

47. On or about October 11, 1995, Sheldon and Hochberg requested that the Commission allow Dr. Dallas Willard, Dr. Joseph Nicolosi, Professor Richard Duncan, and Roger Magnuson, Esq., (the "Mainland Experts") be allowed to present testimony to the Commission by telephone. These individuals are nationally-recognized experts regarding the public policy reasons to extend or not to extend to same-sex couples whatever economic benefits are conferred by law upon married couples. All of them live and work on the Mainland, and none of them were available to appear before the Commission in person at any of the Commission's meetings.

48. By a 5-2 vote, and acting upon advice obtained from the LRB, Gill and the Majority refused to hear the testimony of the Mainland Experts, in wilful violation of section 92-3 and 92-1 of the Hawaii Revised Statutes, as amended.

49. The Commission's flaunting of the provisions of section 92-3 of the Hawaii Revised Statutes, as amended, with respect to the Mainland Experts completely undermines the credibility of the Report, and the Report, being the final action taken by the Commission, should be voided by this Court. Allowing the Report to stand as an official government document in light of

the Commission's violation of sections 92-1 and 92-3 with respect to the Mainland Experts would irreparably harm the public.

**G. COUNT 4: THE COMMISSION FAILED TO PRODUCE MINUTES OF ITS MEETINGS IN VIOLATION OF HAWAII REVISED STATUTES SECTION 92-9.**

50. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 49.

51. Section 92-9 of the Hawaii Revised Statutes, as amended, provides:

(a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;
- (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
- (4) Any other *information that any member of the board requests be included* or reflected in the minutes.

(b) The minutes shall be public records and *shall be available within thirty days after the meeting* except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

(c) All or any part of a meeting of a board may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction, except when a meeting is closed pursuant to section 92-4; provided the recording does not actively interfere with the conduct of the meeting.

(Emphases added.)

52. The Commission has not approved minutes of several meetings going back more than thirty days, although the Majority has cited in the Report to purported minutes of meetings which have not been reviewed and approved by the Commission. Moreover, Gill and the Majority have refused to include in meeting minutes information requested by Sheldon and Hochberg to be included, which information accurately reflects things which occurred in Commission meetings.

53. The Commission's violations of section 92-9 of the Hawaii Revised Statutes, as amended, constitute further violations of section 92-1, and they further undermine the credibility of the Report.

54. Section 92-12(c) of the Hawaii Revised Statutes, as amended, provides:

(c) Any person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of this part or to determine the applicability of this part to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and costs to the prevailing party in a suit brought under this section.

55. Moreover, section 92-12(d) of the Hawaii Revised Statutes, as amended, provides:

(d) The proceedings for review shall not stay the enforcement of any agency decisions; but *the reviewing court may order a stay* if the following criteria have been met:

- (1) There is likelihood that the party bringing the action will prevail on the merits;
- (2) Irreparable damage will result if a stay is not ordered;
- (3) No irreparable damage to the public will result from the stay order; and
- (4) Public interest will be served by the stay order.

(Emphasis added.)

(Emphasis added.)

56. Because the Commission's violations of section 92-9 of the Hawaii Revised Statutes both undermine the credibility of the Report and violate the public trust and the policy set out in section 92-1, the Court should both order that the Report be voided and that the distribution of copies of the Report in any form which purports to represent that the Report is an official government document, be stayed.

**H. COUNT 5: THE REPORT FOCUSES ON DERAILING THE STATE'S POSITION IN *BAEHR V. MIIKE* RATHER THAN ON CARRYING OUT THE COMMISSION'S CHARGE UNDER ACT 5.**

57. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 55.

58. The Report pretends to address the questions posed by the Legislature in Act 5, but it clearly is little more than an attempt to advocate the position that the State of Hawaii has no compelling interest in denying marriage licenses to same-sex couples, which is the issue before the court in *Baehr v. Miike*. That the Majority would take this tack was announced before the Commission began its work. Thus, the Report is unresponsive to the Legislature's charge and this Court should order it void.

59. Furthermore, since the obvious intent of the Report is to influence ongoing litigation, substantial harm could result to the public if the Report is disseminated under the guise of being an official government document. Accordingly, publication of the Report should be enjoined.

**I. COUNT 6: THE MAJORITY AND/OR THE LRB EDITED THE MINORITY REPORT AFTER IT WAS APPROVED BY THE COMMISSION, AND THE DELETIONS MADE BY THE MAJORITY AND/OR THE LRB SHOULD BE RESTORED TO THE MINORITY REPORT.**

60. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 58.

61. After the Commission had voted 5-2 on December 8, 1995 to approve the Report (including the Minority Report), the Majority and/or the LRB edited the Minority Report by deleting certain material, without the knowledge or consent of Sheldon and Hochberg.

62. The editing of the Minority Report by the Majority and/or the LRB was contrary to representations that had been made to Sheldon and Hochberg by the Majority to the effect that the Majority would not attempt to affect the content of the Minority Report.

63. The editing of the Minority Report by the Majority and/or the LRB was clearly in violation of both the spirit and the letter of section 92-1 of the Hawaii Revised Statutes, as amended, and, on that ground, the Court should order that the deleted material be restored to the Minority Report.

**J. COUNT 7: THE MAJORITY INSERTED MATERIAL INTO THE REPORT IN SUCH A WAY AS TO PREVENT SHELDON AND HOCHBERG FROM RESPONDING TO IT, AND THE MAJORITY HAS REFUSED TO ALLOW SHELDON AND HOCHBERG TO ADD APPENDICES TO THE REPORT WHICH WILL MAKE THE REPORT MORE BALANCED.**

64. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 62.

65. On December 7, 1995, Sheldon and Hochberg received "final" copies of the portion of the Report prepared by the Majority, and at that time learned that the Majority had added material to the Report to which Sheldon and Hochberg wished to respond.

66. Sheldon and Hochberg requested that certain specified materials be added to the appendix of the Report in response to the Majority's newly-added material, but Gill and the Majority voted 5-2 to disallow the adding of any further appendices to the Report.

67. The Majority's refusal to allow Sheldon and Hochberg to add materials to the Report which would balance materials added by the Majority at the last minute was a clear violation of both the spirit and the letter of section 92-1 of the Hawaii Revised Statutes, as amended, and, on that ground, the Court should order that the material requested by Sheldon and Hochberg be added to the Report.

**K. COUNT 8: THE MAJORITY CIRCUMVENTED NOTICE REQUIREMENTS WITH RESPECT TO COMMISSION MEETINGS**

68. Sheldon and Hochberg reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 67.

69. Section 92-7 of the Hawaii Revised Statutes, as amended, provides:

(a) The board shall give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated.

(b) The board shall file the notice in the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office for public inspection, at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible.

(c) If the written public notice is filed in the office of the lieutenant governor or the appropriate county clerk's office less than six calendar days before the meeting, the lieutenant governor or the appropriate county clerk shall immediately notify the chairperson of the board, or the director of the department within which the board is established or placed, of the tardy filing of the meeting notice. *The meeting shall be canceled as a matter of law, the chairperson or the director shall ensure that a notice canceling the meeting is posted at the place of the meeting, and no meeting shall be held.*



(d) No board shall change the agenda, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. Items of reasonably major importance not decided at a scheduled meeting shall be considered only at a meeting continued to a reasonable day and time.

(Emphasis added.)

70. On the advice of the LRB, the Commission wilfully and improperly amended the agenda of the Commission's November 22 meeting so as to circumvent the clear provisions of section 92-7 of the Hawaii Revised Statutes, as amended, which required (among other things) that the December 6, 1995 meeting of the Commission "be cancelled as a matter of law."

71. Accordingly, this Court has the authority, pursuant to section 92-11, to void the Report, and the Court should do so in order to prevent irreparable harm to the public.

WHEREFORE, Sheldon and Hochberg pray that this Court grant the following relief:

A. A declaratory judgment that the work of the Commission was carried out in violation of Article XVI section 4 of the Constitution of the State of Hawaii, and that the policies, practices and acts complained of herein are illegal and unconstitutional.

B. A declaratory judgment that the acts of the Majority violated Chapters 92 and 26 of the Hawaii Revised Statutes, as amended, and on that ground are illegal.

C. A declaratory judgment that the appointments of the Commissioners and the acts of the Commission constitute ultra vires acts and that the appointments are null and void.

D. A declaratory judgment that the Report is null and void, based upon the Majority's wilful violations of sections 92-3 and 92-7 of the Hawaii Revised Statutes, as amended.

E. An order temporarily staying implementation of the Commission's recommendations and restraining the defendants, their agents, representatives, and all others acting by, through, and under them from:

(1) Commencing or conducting further meetings to discuss and to prepare, publish or distribute the Report, or to finalize any additional minutes of meetings.

(2) Presenting the Report to the legislature and the public.

(3) Allowing the LRB to give administrative support to any member of the Commission.

F. A preliminary and permanent injunction staying implementation of the Commission's recommendations and enjoining the defendants from:

(1) Commencing or conducting further meetings to discuss and to prepare, publish or distribute the Report, or to finalize any additional minutes of meetings.

(2) Presenting the Report to the legislature and the public.

(3) Allowing the Legislative Reference Bureau to give administrative support to any member of the Commission.

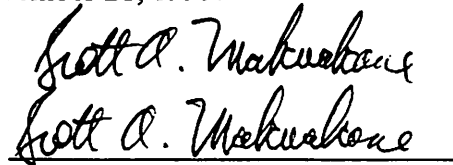
G. An order awarding Plaintiffs reimbursement of attorneys fees and expenses of this litigation as provided in section 92-12 of the Hawaii Revised Statutes, as amended.

H. An order directing the Majority to publish in the Internet, to the "Marriage Mailing List" subscribers (located at and accessed by typing "majordomo@abacus.oxy.edu") a copy of this Court's order granting any or all of the relief prayed for in this complaint, in order to notify those seeking to publish, distribute, or use the Report of the status of the validity (if any) of the Report.

I. As alternative relief, (1) an order directing the Majority and the LRB to include in the final version of the Report the material which Sheldon and Hochberg sought to have added in response to the last-minute additions to the Majority's portion of the Report, and (2) an order directing the Majority and the LRB to restore the portions which the Majority and/or the LRB deleted from the version of the Minority Report which was approved by the Commission on December 8, 1995.

J. Such other and further relief as this court deems just and equitable.

DATED: Honolulu, Hawaii, December 21, 1995.

  
SCOTT A. MAKUAKANE  
Attorney for Plaintiffs



EXECUTIVE CHAMBERS  
HONOLULU

BENJAMIN J. CAYETANO  
GOVERNOR

August 10, 1995

Ms. Marie A. "Toni" Sheldon  
Pauahi Tower, Suite 1200  
1001 Bishop Street  
Honolulu, Hawaii 96813

Dear Ms. Sheldon:

It is my pleasure to appoint you to the Commission on Sexual Orientation and the Law, effective immediately.

Act 005, Session Laws of Hawaii 1995, establishes the commission which is attached for administrative purposes to the Legislative Reference Bureau. The purpose of the commission is to 1) examine the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples; 2) examine the substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples; and 3) recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

You have a tremendous task ahead of you and I thank you for your willingness to serve on this very important commission.

With warmest personal regards,

Very truly yours,

BENJAMIN J. CAYETANO

EXHIBIT "A"



EXECUTIVE CHAMBERS  
HONOLULU

BENJAMIN J. CAYETANO  
GOVERNOR

August 10, 1995

Mr. Lloyd James Hochberg, Jr.  
1188 Bishop Street  
Suite 1610  
Honolulu, Hawaii 96813

Dear Mr. Hochberg:

It is my pleasure to appoint you to the Commission on Sexual Orientation and the Law, effective immediately.

Act 005, Session Laws of Hawaii 1995, establishes the commission which is attached for administrative purposes to the Legislative Reference Bureau. The purpose of the commission is to 1) examine the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples; 2) examine the substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples; and 3) recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

You have a tremendous task ahead of you and I thank you for your willingness to serve on this very important commission.

With warmest personal regards,

Very truly yours,

  
BENJAMIN J. CAYETANO

EXHIBIT "B"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARIE A. SHELDON and LLOYD ) CIVIL NO.  
JAMES HOCHBERG, JR. ) (Declaratory Judgment)  
)  
Plaintiffs, ) SUMMONS  
)  
VS. )  
)  
BENJAMIN CAYETANO, in his capacity )  
as Governor of the State of Hawaii; )  
THOMAS P. GILL, in his capacity as )  
Chairman of the Commission on Sexual )  
Orientation and the Law; MORGAN )  
BRITT, L. KU'UMEAALOHA GOMES, )  
NANCI KREIDMAN, and ROBERT )  
STAUFFER, in their capacities as )  
members of the Commission on Sexual )  
Orientation and the Law; and WENDELL )  
K. KIMURA, in his capacity as Acting )  
Director of the Legislative Reference )  
Bureau, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

SUMMONS

STATE OF HAWAII

To the above-named Defendants:

You are hereby summoned and required to serve upon SCOTT A. MAKUAKANE, ESQ., Plaintiffs' attorney, whose address is Beck & Taylor, Attorneys at Law, 1188 Bishop Street, Suite 1610, Honolulu, Hawaii 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service.

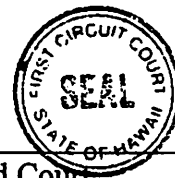
If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawaii, DEC 21 1995

B. CHO



\_\_\_\_\_  
Clerk of the above-entitled Court

Ward Stewart  
2085 Ala Wai Blvd.  
Honolulu, Hawaii  
96815

December 26, 1995

The Governor's Commission on Sexual Orientation and the Law  
C/O Legislative Reference Bureau  
State Capital, Room 446  
Honolulu, Hawaii  
96813

Following: testimony which I would wish to have placed before the committee.

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We have heard a steady drumbeat through these discussions to the effect that what we do here in Hawaii will somehow destroy the inviolable models of family and marriage.

While some "Christian" groups claim to be promoting what they choose to call family values; my family supports the values of integrity, honesty and unconditional love. This issue needs dialogue and understanding, not hostile rhetoric. Rigid, fundamentalist thinking will not solve this dilemma.

During the discussion of this matter we have heard an assertion made by those who would keep us in the closet; an assertion you will hear often in these discussions of same-gender marriage. The implication of this would deny us liberty, would deny us the pursuit of happiness and would deny us even life itself. This is a peculiar notion that homosexuality involves a "choice," a sinful choice made for bad reasons. We have heard over and over again that this unfortunate choice can be remedied. All we have to do is "change."

On our side of the aisle we are here to assure you that homosexuality is not, repeat, not a matter of choice. Sexual orientation is part of the very basis, the bricks and mortar of personality. For any practical purpose it is immutable, fixed. This opinion was held by Sigmund Freud. This view is now that of the American Psychiatric Association, the vast majority of churchmen, and the overwhelming majority of homosexuals themselves. What we have here is the work of a small and vociferous minority who claim to speak for family, and American Values and, indeed, for God himself.



It is clear to me that homosexuality is not a choice, not something that can be casually changed. It is equally clear to me that hatred and bigotry are choices. These are cruel choices and can be changed.

In recent history the Mormons, the Christian Scientists, the Seventh Day Adventists and the handlers of serpents have ALL defended their freedom to worship in minority ways. They have all, properly, sought protection in our wonderful constitution. Now, an intolerant minority of these same folk would deny such protection to me and my ohana. In the name of what they have chosen to call "*Family Values*" they would deny me and my family our very right to exist.

Here in Hawaii Nei where we have a long and rich history of tolerance for people of all races, religions, ancestry and gender we must not deny full civil rights to our citizens on religious grounds. Remember that slavery, miscegenation laws and apartheid were all, in their wretched day, firmly bible based, the word of God given.

Pat Robertson, Jerry Falwell, Pat Buchanan, the Rutherford Klan, and an army of hate-mongers are on the move. Their objective is to have the United States declared a "Christian" country. Here in multi-ethnic Hawaii this idea can be seen as the poison that it is! Here where the worship of Pele is part of our fabric we must be appreciative of freedom of religion and the separation of church and state.

Hate is not a Christian value, a family value, or a traditional American value. To deny people their rights because they are different is surely cruel, un-Christian, and un-American. To legislate such a denial is a step backwards. Do not take it.

Some years ago, during the civil-rights struggle with school integration we heard of bussing and school busses as if they had not existed before. Suddenly busses were a major American issue and concern. Jesse Jackson spoke then and said, "Its not the bus, its us!" He was exactly right. Now we hear that we will destroy marriage and family values. Its not marriage its us! make no mistake about it, the issue is the same, the mischief is the same, the challenge is the same.

Last year a famous American stood up and greatly surprised his neighbors by saying --

"Gays and lesbians are a part of every American family. They should not be shortchanged in their effort to better their lives and serve their communities. . . It's time America realized that there was no gay exemption in the right to 'life, liberty, and the pursuit of happiness.'

Barry Goldwater - July 1994

The enemy here is our old human failing of prejudice and intolerance -- fear of those who are perceived as being "different."

The only way I know to combat this cruelty is to announce to the world that we are here, we are your friends and neighbors, your brothers and sisters; we are cops and firemen, nurses and doctors, clergy and rubbish collectors, heroes and villains. In short, we are you.

I can only suppose that the wish to stand up in public and avow our commitment to our lives by appearing slightly foolish must seem odd to the majority. To us it is of profound significance. I am sixty-five years old and grew up in the bad old days of repression and dark night. My lover and I have been together for thirty-nine years and we are very proud of this. Proud of what we have made of our lives. Just think how you might feel if you and your spouse came to your golden wedding anniversary and were permitted to tell no one; were forced to celebrate this milestone of your lives among a few intimates and behind closed doors at that.

We can do better than that -- we will do better than that!

Omnia Vincit Amor--

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Testimony to Support the Traditional Marriage Resolution

Refuting rationale for same-sex marriage:

- A. Homosexuality is a 'special class' based upon sexual orientation.
1. The Supreme Court's 3-point criteria for determining "minority" status does not apply to homosexuals, who are not deprived of opportunities.
  2. Even though homosexual behavior is a choice, like religion, it is not on the same ethno/cultural level.
- B. Homosexuality deserves equal public approval as heterosexuality.
1. Although it is claimed there is a biological predisposition for homosexuality (and therefore it is not a choice), science has not yet produced evidence of it. According to the November 1995 edition of the *Scientific American*, there is NO "gay" gene. Furthermore, the homosexuals who have abandoned the lifestyle attest that 'sexual orientation' can change.
- C. "Commitment" to partner should warrant marital benefits.
1. I do not expect that the degree of commitment I feel toward a friend (conjugal or not) should qualify me for a newly create "class" of people, who derive benefits equal to those of another class.
- D. Sodomy laws should be equally enforced among heterosexuals.
1. The act of sodomy alone is insufficient to account for the aggregate social implications inherent with the advancement of the politically laden "gay agenda."
- E. Religion cannot dictate civil law.
1. Conversely, law cannot dictate religion.
  2. Article I of the *Bill of Rights* states Congress cannot make a law which prohibits the free exercise of religion; Hawaii augments that law.
  3. Legalizing same-sex marriage would restrict free expression of the Biblical repudiation of homosexual behavior; thus prohibiting the free exercise of religion.
  4. Before the State could sanction same-sex marriage (and teach it in government schools) it would have to repeal the protection clause over free exercise of religion.

**F. Homosexuals require extra protection because of "hate crimes"**

- 1. Women and children are beaten to death daily; so why aren't "hate crime" protections laws extended to them?**
- 2. It was the homosexuals who stormed across society's old borders and assaulted traditional American positions, who painted themselves as VICTIMS of social and legal persecution.**
- 3. Homosexuals act out against citizens who disagree with their analysis of the sexual nature of mankind. They call them derogatory names; and demonstrate lewd sexual acts while parading nude in front of St. Patrick's Cathedral, the Castro district, and elsewhere; they disrupt Sunday services and vandalize churches. Who, then, is persecuting whom?**

**G. Government should not be in the business of sanctioning marriage.**

- 1. Abolishing marriage laws would further erode the best hope society has for raising healthy children. The most recent social research confirms that youth crime is directly related to single parenting. The prevention of "high risk" children is best achieved with two biological parents married to each other and living at home. As with all moral breakdown, homosexual marriage would produce more angry, confused, dysfunctional and violent youth.**
- 2. Government has the obligation to support public policy which promotes the general welfare. By preserving heterosexual marriage, the government encourages traditional families who provide many needed services that the government cannot supply.**
- 3. At a time of budget shortfalls, it is inconceivable that the state would extend costly medical benefits to sexual partners of state employees, while dropping 5,642 permanently disabled people from public assistance. These folks face a bleak future of homelessness, as they will never be able to physically support themselves. How can the state conscionably favor homosexual unions over charity for the permanently disabled, and continue to refer to themselves as a civilized society?**