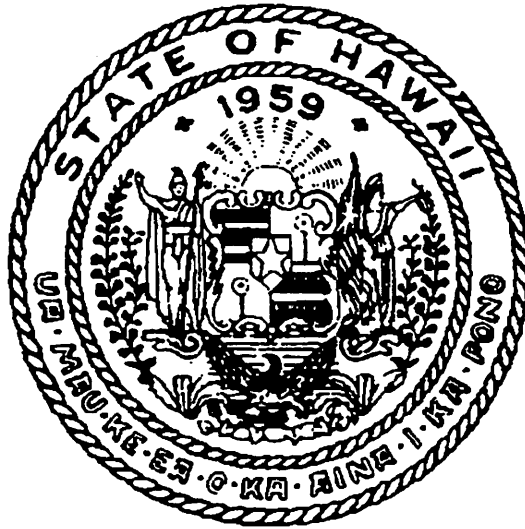


**Report of the Commission
on Sexual Orientation
and the Law**

**Thomas P. Gill, Chair
Morgan Britt
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Nanci Kreidman
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SUMMARY

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

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

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

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

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

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

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

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PREFACE

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

I. Background and Authority

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

A. *Baehr v. Lewin*; An Overview

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

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

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

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

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

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

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

B. Legislative Action

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

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

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

II. The Commission Members

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

5. *Id.*

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

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

III. Report Overview

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

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

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

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

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

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

Chapter 2 focuses on the issues surrounding the second task:

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

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

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

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

Chapter 5 contains the minority opinion in full.

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

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

Chapter 1

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

The Commission approached their first task to

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

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

I. Supreme Court and Act 217 Commission's Work

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

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

II. Invited Guests

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

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

III. Terminology

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

A. The Definition of Major Legal and Economic Benefit

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

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

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

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

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

MAJOR LEGAL AND ECONOMIC BENEFITS

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

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

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

are not extended to same-sex couples."

with Act 5, Session Laws of Hawaii 1995:

- "(1) Identify the major legal and economic benefits to married couples that are not extended to same-sex couples."

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

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

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

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

21. Section 11-204, *Hawaii Revised Statutes* (1993 and Supp. 1995), was used as an example of this. This allows a candidate for public office to receive not more than \$50,000 from an immediate family member; otherwise contributions are limited to \$2,000, \$4,000, or \$6,000 per individual. See Minutes of September 27, 1995, for testimony of Sumner La Croix, Ph.D.

22. Section 304-4(b), *Hawaii Revised Statutes* (1993 and Supp. 1995), authorizes a non-resident university employee's spouse to qualify for a resident tuition.

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

24. *Id.*

25. Cobb, Clifford, Ted Halstead and Jonathan Rowe, "If the GDP Is Up, Why Is America Down?" *The Atlantic Monthly*, October 1995, pgs. 59-78.

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

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

The public testimony of both economists and the professor of law²⁸ brought out that it would be unfair or an incomplete review if the examining of benefits was not weighed with any correlating burdens. The Commission did not disagree and, while no formal motions were made, it was accepted that the burdens would be addressed at the appropriate time. The double-edged sword of marriage rights and benefits versus the burdens and obligations appears particularly in the arena of determining the economic value of benefits.

C. Economic Values

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

1. Intangible Benefits

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

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

27. See Minutes of September 27, 1995.

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

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

30. See Minutes of October 25, 1995.

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2. Substantial-Quantifiable Benefits

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

3. General Benefits

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

D. Other Jurisdictions and Dependent Benefits

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

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

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

"International Implications

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

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

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testimony³³ with regard to the federal tax system, and as our state tax system is based on the Internal Revenue Code,³⁴ the essence of that discussion is included in this report.

Regarding tax issues, both economists and the professor of tax law agreed that the tax law can carry a marriage "bonus" or a marriage "penalty" and was strictly dependent on individual fact situations.³⁵ For example, when married couples have two \$100,000 incomes there is a marriage "penalty," but if the same amount of income (\$200,000) is earned by one married individual with the other married individual as a dependent, there is a benefit of reduced taxes. Combining several ideas suggested by those who testified before the Commission, the benefit may be framed in this particular situation as giving the couple the opportunity to make a choice³⁶ to select an "economy of the family."³⁷ This economy of the family issue relates to the decisions families make as to what is the best economic situation for the family. For example, does one spouse work in the home to provide care for children or do both spouses choose to work and pay someone to care for the children. Often these decisions are based on the economic impact of these decisions. For example, will there be higher taxes if both work, or additional costs for health insurance? And what is the cost of a caregiver for a dependent?

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

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

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

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

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

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

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

35. *Id.*

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

IV. Conclusions

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

A. Intangible Benefits

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

37. See Minutes of October 11, 1995, pg. T-32, for testimony of Moheb Ghali, Ph.D. describing family decisions to join the work force and be entitled to health insurance.

38. While this benefit has no statutory citation it is well-accepted policy of many hospitals to allow only family members to visit seriously ill patients.

39. Section 327-5, *Hawaii Revised Statutes* (1993), relying on section 327-3, *Hawaii Revised Statutes* (1993), for authorized personnel for that decision.

40. Section 346-15(d), *Hawaii Revised Statutes* (1993).

41. See sections 334-60.4, 334-60.5, 334-125, and 334-134, *Hawaii Revised Statutes* (1993 and Supp. 1994) (notice for involuntary hospitalization for mental health reasons); section 346-71, *Hawaii Revised Statutes* (1993) (notice required for proceedings for order for immediate protection to spouse).

42. Section 626:1-505, *Hawaii Revised Statutes* (1993).

43. Section 626:1-504, *Hawaii Revised Statutes* (1993).

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all, the simple recognition and equality⁴⁴ that is bestowed by section 572-1, *Hawaii Revised Statutes*, the requisites to enter into a valid marriage contract.

B. Substantial-quantifiable Benefits

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

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

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

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

"The Commission further finds that beyond the specific intangible benefits

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1. Spousal and Dependent Support Benefits

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

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

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

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

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

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

45. See Note 13.

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

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

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

2. Health Insurance Benefits

The Commission also recognizes health insurance benefits as a major legal and economic benefit. The Hawaii Prepaid Health Care Act⁵¹ mandates that employers provide a minimum package of health insurance benefits to employees who work more than twenty hours per week. The law allows an employer to charge the employee up to 1.5 percent of the employee's wage or salary as payment towards the health insurance premium.⁵² A parallel law⁵³ 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.⁵⁴ For most workers, even if an amount is withheld from their salaries, the portion contributed by the employer is still substantial. Some employers in Hawaii in certain situations pay all of the insurance premium, a substantial benefit.

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

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

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3. Other Insurance Benefits

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

4. Retirement Benefits

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

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

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

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

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

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

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

60. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Workers' Compensation Benefits

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

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

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

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

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

69. *Id.*

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

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

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

6. Wrongful Death Benefits

The Commission identified a major legal and economic benefit under the wrongful death law.⁷³ 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,⁷⁴ and marital care, as well as the expenses of any illness and burial. In most cases, an uncertified spouse cannot sue for support. For example, if someone murders or causes the wrongful death of a spouse, except for any private insurance a same-sex couple may have carried, and except for the extremely limited payments under the Criminal Injuries Compensation law,⁷⁵ the surviving partner will get no monetary payment other than charity.

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

7. Hawaiian Home Lands Surviving Spouse Benefit

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

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

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

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

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

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

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

8. Savings in "Creating the Relationship"

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

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

The benefits in this package start with the right to change your name without paying the normal costs of a name-change, \$50 plus \$250 in legal and notice fees.⁸⁰ Another item of this benefit is under the probate code where a certified spouse can inherit by intestate succession. In addition, the surviving spouse would be presumed to assume the custody of any dependent children. Non-certified spouses can attempt to replicate this right by each having careful wills and trusts set up by their lawyer(s) at a substantial cost of \$300 for the two wills⁸¹ and \$3,000 for the two trusts. An additional parenting agreement that details what happens if the marriage is dissolved, including the care for children and custody and visitation

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

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

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

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

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

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

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

9. Income Tax Rate Benefits

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

10. Additional Income Tax Benefits

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

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

83. *Id.*

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

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

11. Estate and Transfer Tax Benefits

The Commission identified major legal and economic benefits in the Estate and Transfer Tax Reform Act of 1983.⁸⁵ This state estate and transfer tax is based solely on the federal estate and gift tax and as such the allowances and laws regulating those actions directly affect the State's treatment. Under the federal estate and gift tax laws, a legally married person receiving an estate (or total gifts) beyond \$600,000 from his or her spouse does not owe transfer taxes due to the unlimited "marital deduction." Other heirs, including an uncertified spouse, would have to pay estate and transfer taxes on the value of the estate or gifts beyond the \$600,000 ceiling. The generally positive effect of this law for certified surviving spouses is to allow them to defer payment of the transfer tax until their own death. Also, annual gifts beyond \$10,000 to unrelated individuals are taxed; transfers to spouses are not taxed.⁸⁶

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

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

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

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

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

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

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

It is difficult to put precise figures on this benefit as its value depends on the worth of the couple's house (and other assets), and the number of years the surviving spouse remains alive. However, it can be pointed out that all homes in Hawaii have appreciated substantially over time; in the three-year 1988-1990 period, appreciation averaged about \$200,000. Taking this example, if a couple owns a house that went through this appreciation period, then each of their capital-gain was about \$100,000.⁸⁸ Upon death, the inheriting spouse, if they did not have the government marriage certificate, could have to pay capital-gains taxes on the deceased spouse's appreciation, a tax which in this case could be \$45,000 to \$50,000.

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

13. "Tenancy by the Entirety" Benefits

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

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

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

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

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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.⁸⁹

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

14. Federal Benefits

The Commission acknowledges that it has previously stated that identifying the benefits beyond the State's jurisdiction is beyond the scope of the task assigned. But as many of the federal benefits are driven by the State definition of marriage, the Commission is obligated to recognize that the State of Hawaii can directly control who is technically certified to receive federal spousal benefits. The Commission therefore finds the State's ability to indirectly award these federal benefits through a valid marriage certificate is a major legal and economic benefit. Specifically these include special spousal rights under the Retirement Equity Act of 1984. This is a "choice" type benefit as the special rights can cut both ways, and the main option of being able to get a certificate is that the couple has the choice of taking out the certificate or not and therefore being covered or not under the REA.⁹⁰ 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.⁹¹

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

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

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

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

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

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

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

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

C. General Benefits

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

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

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

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

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

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

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

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

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

V. Summary

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

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

Chapter 2

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

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

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

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

I. Public Policy

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

A. Equal Protection

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

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

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

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

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

These equal protection arguments are based on the specific language of the State of Hawaii Constitution¹⁰⁰ which is similar to the United States Constitution. The Commission recognizes that the over-riding right that "no person shall be ... denied the equal protection of the laws"¹⁰¹ is one of the basic liberties we hold to be self-evident. The Hawaii Constitution extends this prohibition of discrimination further than the United States Constitution by prohibiting discrimination based on gender. In Hawaii "No person shall ... be discriminated

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

100. See Note 1.

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

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

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

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

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

Some public testimony argued that allowing same-gender marriage would give special rights not equal rights. The Commission considered the issue of special rights and agrees that the benefits might appear special because they have not yet been granted to same-gender couples by any state. On closer examination, however, we find that the rights being discussed are important civil rights and the benefits being granted are already available to others, and no special benefit is being contemplated. The Commission recalls the debate over the Civil Rights Act of 1964.¹⁰⁵ Thirty years ago it was thought to be a special right for an African-American person to spend a night in a white-owned hotel in the South or to eat in an all-white restaurant. These are rights that are taken for granted today. The Commission believes that thirty years from now, the majority of citizens will look back on the extension of marriage rights as the right thing to do.

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

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

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

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

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

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

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

B. The *Loving* Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related to the arguments that the public order in Hawaii would be disrupted are the contentions that extending benefits to same-gender couples will wreak havoc on the economic status of the State. Again, we can point to another similarity to the *Loving* case. The State of Virginia feared economic hardship if racial discrimination were ended. The Commission heard substantial testimony on the economic effect on tourism in Hawaii if benefits are extended to same-gender couples. Testimony from economists¹¹² focused on a *Southern California Law Journal* article.¹¹³ That article projected a \$153 million annual increase in tourism to Hawaii from gay and lesbian couples travelling to the first state that allowed same gender marriage.¹¹⁴ Even though economists discounted the methodology of the article's author, who is not an economist, they agreed there would be some effect, and two of them estimated the positive effect at \$127 million over five years,¹¹⁵ though all three economists agreed that a more precise estimate would be difficult to predict without further data. The range of general testimony on how the State will fare economically if same-gender marriage were allowed included a prediction of an economic boost, fear it will create a situation that will destroy tourism in Hawaii, and still others said that the effect would be unnoticeable.¹¹⁶ The Commission has heard testimony and is aware of the economies of other cities and communities where gay rights have been strongly supported, and understands those areas not to have suffered economically but have even prospered.¹¹⁷ Therefore, the Commission does not give weight to the argument that tourism will be effected negatively.

111. A partial list includes Quakers, Metropolitan Community Church, Unity, Universalist-Unitarians, Dignity USA, and Buddhists.

112. See Minutes of September 27, 1995, pgs. T-10 to T-22, for testimonies of Sumner La Croix, Ph.D. and Jim Mak, Ph.D. and Minutes of October 11, 1995, pgs. T-35 to T-56 for testimony of Moheb Ghali, Ph.D.

113. Brown, Jennifer Gerarda "Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage," *Southern California Law Review*, Volume 68, 1995, pgs. 745-839.

114. *Brown* at 755.

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

116. *Id.*

117. Drummond, Tammerlin. "Not in Kansas Anymore," *Time*, September 25, 1995, pgs. 54-55.

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Discussion of the economic effect on tourism included the introduction of a resolution¹¹⁸ that explored the results of accepting or rejecting certain public policies. Basically, if a given action by the legislature were to cause loss of jobs or income, it would be opposed as bad for the community and considered a bad policy for the State. Conversely, if such an action created positive conditions for the average citizen, it could be seen as a good policy for the State. Sifting through the testimony, the Commission finds a net positive economic impact from legalizing same-gender marriage and simply recognizes that a new incentive for a particular market to visit the islands would increase the tourism economy of the State. Adopting a policy that would have that result would be good for the State.

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

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

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

118. See Minutes of October 25, 1995.

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

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

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

C. Procreation and Compelling State Interests

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

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

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

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

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

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

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

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

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

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

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

D. Separation of Church and State

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Conclusion

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

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

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