

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
Thereof, Whether Referred to as Civil Unions, Domestic Partnerships,  
or Otherwise SB 427, Chapter 100:2, Laws of 2004**

**EXECUTIVE SUMMARY OF FINAL REPORT**

***The Commission and the Same Sex Marriage Debate.*** The enactment of SB427 set up a legislative commission to study all aspects of same sex marriage. The Commission spent the last 16 months doing just that, meeting nearly 20 times in the last seven months. The Commission visited four communities outside of Concord in an attempt to hear as broad an array of opinions as possible. We listened to the comments of over 200 citizens and reviewed the statements of scores more. We also sought the input of experts listening to the testimony of dozens of specialists in medicine, social science and public policy stretching over several days. An estimated 700 or more attended one or more of the hearings or sessions of the Commission. In all, the Commission spent hundreds of commissioner-hours in session, received hundreds of pages of submissions and deliberated about what might be the implications of same sex marriage for New Hampshire communities.

The subject of same sex, genderless, homosexual or gay marriage provokes significant controversy and engenders deep feelings. Some see this as a civil rights issue with anything less than full marriage equality being considered a betrayal of principle. Others see marriage's core concept as involving a man and a woman with any redefinition of marriage that drops that core concept as fundamentally altering the institution itself. People of good intent and deserving of respect are on both sides of this issue. In fact, there are often more than two sides to any particular subset of the issues as the discussion of gay marriage, civil unions and reciprocal benefits illustrates. Although some advocates of gay marriage also support civil unions, others oppose them on the principled basis that civil unions are separate but unequal. Some proponents of gay marriage and civil unions nonetheless balk at a purely contractual extension of benefits to same sex couples, such as a reciprocal benefits agreement, because such a mechanism contains no state recognition or affirmation of the same sex relationship even though the reciprocal benefits agreement mechanism might adequately address the specific problem.

We believe that the debate over same sex marriage will be an important one for our state and for our nation. We also believe that the way in which we engage in this debate will be an important indication of our success in cultivating a strong social fabric. Perhaps, as a Commission we erred on the side of permitting the testimony to be too wide-ranging, often well beyond any valid concern of the Commission. We recognize that in the process many irrelevant and inappropriate things were said by both proponents and opponents of gay marriage. We hope, however, that the Commission's work will be viewed with some tolerance in light of our desire to hear from as many people as possible regardless of whether they were polished in the expression of their views and in light of the Commission's overall success in hearing from so many.

***What this Report Is Not.*** Before turning to the results of our study, let's identify what this report is not.

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**First – This Report Is Not About the Morality of Homosexuality.** First, this report is not about the morality of homosexuality. In New Hampshire, homosexual conduct is not subject to criminal sanction.<sup>1</sup> We recognize that our citizens have differing views on homosexuality, but generally, those competing views are best left to the debate of the public square, the private teaching in the home or the various beliefs of our citizens or their religious institutions. Although the Commission heard significant testimony about differing religious views of homosexuality and gay marriage, the Commission makes no finding about the morality of homosexuality.

**Second – This Report Does Not Condone Discrimination.** Second, this report does not condone discrimination against homosexuals or anyone on the basis of their sexual orientation. New Hampshire is justly proud of its heritage of being welcoming to its gay citizens and permitting them to live with dignity and self-respect. New Hampshire bans discrimination against anyone on the basis of sexual orientation in the work place or in housing. We hope we can build on this tradition of mutual respect.

**Third – This Report Does Not Address Issues Pre-empted by Federal Law.** Third, this Commission recognizes what it and the New Hampshire legislature cannot control. For example, many of the concerns that were voiced during our hearings, such as the tax impact of being denied the opportunity to marry, addressed issues pre-empted by federal legislation.

Based upon our months of study, the majority of the Commission has come to a number of conclusions.

***Marriage Matters.*** First, marriage matters and it matters a lot. Marriage is an important social institution that has a number of interconnected purposes including the procreation and protection of children. A recent report on family law set out the purposes of marriage this way:

Marriage serves a number of critical purposes in human culture. It addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a public form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance. It provides a social frame for procreativity. It fosters and maintains connections between children and their natural parents. It sustains a complex form of social interdependency between men and women. It supports an integrated form of parenthood, uniting the biological (or adoptive), gestational, and social roles that parents play.<sup>2</sup>

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<sup>1</sup> Of course, decriminalizing certain conduct does not in itself mean that the state is morally neutral regarding such conduct. The state might well determine that morally inferior conduct should be decriminalized for other reasons such as lack of injury to third parties, difficulties in enforcement or excessive privacy intrusions involved in enforcement.

<sup>2</sup> Daniel Cere, “*The Future of Family Law – Law and the Marriage Crisis in North America*” (2005) p.20.

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In this view, marriage is not merely a private commitment of two people, but a complex web of relationships and principles that bring a man and a woman together for the purpose of creating and raising children.

Does the definition of marriage make a difference? The Commission agrees with Daniel Cere that “[m]eaning matters, and the institutions that bear it serve to structure our experiences and to steer them in a particular direction.”<sup>3</sup> Changing the meaning of marriage erodes the strength and integrity of the institution. You change the institution itself. Many supporters of gay marriage recognize that re-engineering the meaning of marriage involves a profound shift in our understanding of the institution. One such advocate acknowledged: “[Heterosexuals] are right, for example, that if same-sex couples can get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well.”<sup>4</sup>

These are not mere abstract concepts. The numbers bear them out. Families with a married father and mother and their biological children outperform all other families studied. Of all the family structures that have been well-studied, using large, representative databases, families with a married father and mother and their children outperform all other families studied, including single parents stepfamilies, unmarried biological parents, and cohabiting families. The family with a married biological mother and father leaves the rest behind in terms of psychological development, self-esteem, academic performance, and engagement in risk behaviors such as drugs or early sex. The research confirming the importance of married biological parents is extensive.<sup>5</sup> The scholarly consensus on family structures is summed up as follows:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.<sup>6</sup>

Despite the strong evidence of the superiority of intact marriages in outcomes for children, why do we so frequently hear that same sex parenting studies purport to find that children raised by gay or lesbian couples do as well as other children? The primary reason is that most such studies compare children of lesbian mothers to those with single heterosexual mothers because those are thought to be the most relevant comparisons. As a result, these studies compare gay parenting not to the gold standard of an intact marriage of the biological mother and father, but to one of the other groups of single

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<sup>3</sup> Daniel Cere, *War of the Ring*, in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* 9, 15 (Daniel Cere & Douglas Farrow eds., McGill-Queen's U. Press 2004).

<sup>4</sup> Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999).

<sup>5</sup> See *infra* notes 20-22 and accompanying text.

<sup>6</sup> Krisin Anderson Moor et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, <http://www.childtrends.org/files/marriageRB602.pdf> (June 2002).

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parents or step-parent families that score dramatically less on the outcomes that matter. There may be further reason to question these studies because they are so small and unrepresentative. We believe a broad, extensive body of evidence supports the presumption in favor of the marriage of a man and a woman. We note, however, that where there is uncertainty, we are reluctant, and we believe the legislature should be reluctant, to embark on uncharted seas and risk one of our most vital social institutions. We would rather be more cautious and give the advocates of change time to produce reliable evidence of the supposed benefits of change.

***Genderless Marriage Is Not a Civil Rights Issue.*** Our second conclusion is that declining to redefine marriage does not deny anyone's civil rights. Advocates of gay marriage characterize the current debate as being one of marriage equality. Comparing gay and lesbian citizens to blacks being denied the right to vote or the right to marry whites, they claim that retaining the definition of marriage so that it requires opposite sex partners discriminates against gays and lesbians on the basis of sexual orientation.

This is an important, but misplaced, objection. If the advocates of same sex marriage are right that marriage should be defined merely as the lasting union of two loving and committed adults, then one might argue that homosexual couples are just as capable of commitment as heterosexual couples. If either gender or sexual orientation is no more important than hair color, then perhaps all Americans should join in the campaign to extend marriage rights to gays and lesbians.

The Commission, however, feels that marriage is more than a personal commitment of two adults. We feel that gender and sexual orientation are more important than hair color or height. After careful consideration, the Commission has reached the conclusion that what same sex couples are seeking is not marriage at all, but a wholesale redefinition of marriage that will fundamentally change the institution.

The Commission further finds that the discrimination built into the very definition of marriage is justified by the qualitative differences between same sex couples and man/woman couples. We note four differences below.

**Difference One: Procreation.** First, same sex relationships are not similar to opposite-sex couples in respect of procreation. Every same sex couple is sterile as a couple. There are no exceptions. Same sex couples must "borrow" from someone outside their relationship to have or adopt a child. This "borrowing" necessarily makes the family headed by homosexual parents a more fluid "family of choice".<sup>7</sup>

**Difference Two: Historical Status.** Second, same sex couples are different in terms of historical status. No great civilization has afforded same sex couples legal recognition equivalent to marriage. Only primitive or declining cultures make the list of those that have supposedly accepted same sex relationships. The lack of historical precedent should not be considered fatal to the case for same sex marriage, but it does underscore that what

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<sup>7</sup> See infra note 28 and accompanying text.

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same sex couples are seeking is not so much to enter into marriage as to radically redefine it.

**Difference Three: Child-Rearing Outcomes.** Third, same sex couples are fundamentally different from opposite sex couples in their ability to raise children as we have already discussed. The outcomes for both children and society are likely to be different.<sup>8</sup> Why? Because the relationship is fundamentally different.

**Difference Four: Fidelity and Stability.** Fourth, that same sex couples are fundamentally different from their opposite sex peers is highlighted by differences in such important relational characteristics as fidelity and stability. Generally, same sex relationships are not based upon the same concepts of stability and fidelity as marriage. Long before America developed civil laws to govern marriage, men and women committed to each other for life and overwhelmingly they remained faithful to each other. Despite the increase in divorce in recent decades, most married couples remain faithful. And those relationships are long-lasting. The contrast with fidelity among homosexual men is striking. Although disputed, we received testimony and submissions that gay relationships are briefer and less likely to be monogamous. Gays tend to be measurably more promiscuous than their straight counterparts.<sup>9</sup> Indeed, some gays have advocated that concepts of fidelity and monogamy may have to be modified to fit within the gay culture.

Will marriage change either the length or the nature of the homosexual relationship? Will it help same sex partners to be more committed? Will marriage vows transform two men into two husbands? That seems unlikely. Evidence from countries that offer marriage or marriage-equivalents to same sex couples suggest that relatively few same sex couples make use of these laws and those that do are unusually prone to dissolution. Some homosexual advocates themselves state that homosexual relationships are inherently non-monogamous.

***Genderless Marriage Is Not Good for New Hampshire.*** In light of the above conclusions that marriage as defined between a man and a woman matters to New Hampshire and is in the best interest of her children and society, and that refusing to redefine marriage as genderless is not a civil rights issue, we are led to the further conclusion that we should not adopt genderless marriage in New Hampshire.

In addition to the contributions of traditional marriage already mentioned, the side effects of genderless marriage, intended or not, would have a significant negative impact upon our society. Indeed, one of the themes we frequently heard during hearings and debates at the Commission was that Canada, Massachusetts and Vermont have already embarked

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<sup>8</sup> In a major review of the literature in 2001, two sociologists explored the “findings from 21 studies and demonstrate[d] that the researchers frequently downplay findings indicating difference.” Judith Stacey and Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? *American Sociological Review* 66 (2001): 159-183, 159.

<sup>9</sup> In concluding that claims of homosexual hyper-promiscuity were exaggerated, Eugene Volokh nonetheless estimated that the average American gay has twice as many lifetime sexual partners as does the average straight male. Quoted by Jonathan Rauch, *Gay Marriage* (Holt 2004) 143.

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on the road of same sex marriage or civil unions and yet the anticipated harms have not materialized.

The Commission concludes that many of the worst injuries to society may take a generation or more to be recognized and by then it will be too late to do anything about it, at least for that generation. Further, we believe the record shows that significant changes are already well underway and that they are not positive ones.

**Reduced Parental Rights Regarding Homosexual Sex Education in the Schools.**

That genderless marriage is leading to a social revolution in Canada and Massachusetts should come as no surprise. Indeed, the purpose of some gay marriage advocates is precisely to trigger such a revolution. Several witnesses from Massachusetts gave their testimony that homosexual sex education was entering the schools without parental notification or consent. Teachers and schools are able to use legalized same sex marriage as grounds for superseding parental rights in schools. National Public Radio reported that public school teachers in Massachusetts are now more emboldened to speak out on homosexuality and include gay friendly elements in the curriculum. One such teacher commented: "In my mind, I know that, 'OK, this is legal now.' If someone wants to challenge me, I'll say, 'Give me a break. It's legal now.'" Books promoting same sex marriage are being introduced in elementary schools. In one Canadian lawsuit, gay advocates have demanded "positive queer role models" across the entire curriculum. Complaining parents are branded "homophobes".

Even before the Goodridge decision, Massachusetts schools were on the front lines of this dispute. A gay rights advocacy group distributed the "Little Black Book – Volume 2.0 Queer in the 21<sup>st</sup> Century" at a "Gay Lesbian Straight Education Network" conference held at Brookline High School on May 16, 2005. The "Little Black Book" is a self-guided, pornographic tour of sex acts for homosexual youth that denigrates abstinence and provides lists of local gay bars. The Commission finds this kind of material objectionable and inappropriate for school children, apart from orientation issues.

**The Introduction of Same Sex Marriage Will Further Erode the Right to Speak Against Homosexuality by Employees and Others.** Independent of the current proposal about same sex marriage, many employees are already experiencing retaliation for speech in opposition to homosexuality or same sex marriage. Employees have been fired for expression of views outside of work, organizations asked to close their bank accounts for their views and innkeepers required to host civil unions of gay couples. Moreover, organizations like the Boy Scouts have been denied access to public facilities because of their views on homosexuality. Formal state recognition of same sex marriage can be expected to exacerbate this trend.

The Commission's recommendation against recognition of same sex marriage is based upon the three findings: (a) that marriage makes a difference to children and society; (b) that gay marriage is not a civil rights issue; and (c) that same sex marriage would have wide-ranging and significant social implications. Thus, the Commission stands firmly for

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the complex web of social relationships and meaning that constitutes the traditional view of marriage as being the union of a man and a woman.

***Civil Unions are Not Appropriate for New Hampshire.*** Civil Unions are advocated by some as an incremental, first step to same sex marriage.

**The Separate But Equal Status of Civil Unions Cannot Be Justified.** The Commission believes that creating a separate, marriage-like institution for same sex couples is inappropriate. Moreover, separate but equal is not justified. The Commission readily acknowledges that there may be some instances where specific problems or the inconveniences experienced by gay couples should be remedied, but we believe the appropriate remedies fall short of gay marriage or civil unions.

**Civil Unions are Nothing More than Delayed Recognition of Same Sex Marriage Because Courts Will Require Gay Marriage if Civil Unions are Adopted.** Not only is separate, but unequal not acceptable as an ethical matter, we believe as a legal matter that courts will require recognition of same sex marriage if civil unions are adopted. Thus, we also recommend against civil unions.

***New Hampshire should adopt an Amendment to its Constitution Defining Marriage as the Union of a Man and a Woman.*** The Commission feels strongly that not only does marriage matter, but that the legislature and ultimately the people should have the final say as to how the institution of marriage should be structured and defined. Unfortunately, activist courts in other states have usurped the authority of the legislature with respect to the definition of marriage. Legal experts testified of the risk that a court might mandate gay marriage. In particular, Professor Hesse, emeritus professor of Franklin Pierce Law Center and constitutional law expert, testified that the current prohibition of gay marriage already was invalid under the state constitution. In order to avoid the uncertainties and confusion and, in our view, poor policy making that results from court-mandated same sex marriage, we recommend that the New Hampshire legislature adopt a constitutional amendment defining marriage in New Hampshire as the union of a man and a woman. Such an amendment may even provide a setting that is more conducive to considering specific benefits sought by gay couples.

***Practical Resolutions of Specific Problems.*** Despite the Commission's conclusions that marriage should not be redefined to include same sex partners, the Commission recognizes that our gay and lesbian citizens encounter problems or experience inconvenience as a result of not being married to the partner with whom they have chosen to live. The Commission also recognizes that any assistance provided to gay and lesbian couples may well detract from the social preeminence reserved for marriage and that many of our citizens will oppose extending any benefits on that ground. The Commission proposes, however, to follow a few key principles in resolving the problems identified during Commission hearings.

First, the Commission proposes to not create any new relationship recognized by the state. Second, the Commission proposes that any changes should have limited or no cost to the

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state or private employers. There are, nonetheless, problems that can and should be addressed now without also creating an economic burden on the state or private employers. Instead of redefining marriage to include same sex partners or doing the same thing under the different name of civil unions, some have advocated a third alternative a reciprocal benefits registry or agreement. *See* Mooney Minority Report. In light of the foregoing, the Commission makes the following two recommendations.

**First Specific Proposal – Expansion of Patients Bill of Rights.** One of the specific concerns frequently voiced during the course of the hearings was the serious inconvenience or even injustice that occurred when a long-term same sex partner was denied the opportunity to visit his or her partner in the hospital. In some situations, a right to visit already exists, but may not always be honored. In other situations, such a right does not specifically exist although individual hospitals may well extend it. In either case, there appears to be at least sufficient anecdotal evidence to cause concern. The Commission, thus, recommends that the Patient’s Bill of Rights be extended to include a right for any patient to specify who can visit him or her in the hospital.<sup>10</sup>

**Second Specific Proposal – Automatic Recognition of Co-Guardian Rights.** The Commission also recommends that New Hampshire automatically extend co-guardianship status to all individuals who have parental status in another jurisdiction (even if that parental status is ultimately based upon a same sex marriage in the out-of-state jurisdiction). The intent of this proposal is not to recognize the out-of-state marriage, but to recognize the parental status that may grow out of it so that children coming to New Hampshire with a parental relationship will not completely lose that relationship at the border. The Commission notes that this is a status for which gay and lesbian residents may already apply, but we feel it should be automatically extended to new residents or those in transit because of the increased likelihood that they will not file the required paperwork in time to have practical effect.<sup>11</sup>

**Conclusion.** New Hampshire should remain committed to creating a welcoming environment for its gay and lesbian citizens to live with dignity and respect. There is no excuse for discrimination on the basis of sexual orientation. The conduct of the current debate about gay marriage should not be permitted to incite prejudice or bad feelings toward any of our citizens who have elected to engage in a homosexual lifestyle.

At the same time, marriage as currently defined does make a difference to our society. One of the great strengths of marriage may well be that individuals participating in it do not have to be aware of the source of those benefits to receive them. We believe that a deep and thoughtful review of the issues will lead the legislature and the people of New Hampshire to similar conclusions about the important role that marriage plays in our society and how we should strengthen rather than weaken its ability to play those roles.

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<sup>10</sup> The right to identify who can visit a patient in the hospital today only applies to patients who are terminally ill. The proposed expansion would include all patients. The current right only permits patients to identify visitors from a limited list of potential visitors, including relatives, but with little opportunity to include same sex partners.

<sup>11</sup> At this point we also note that the Commission rejected a motion to recognize second parent adoption.

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**FINAL REPORT**

**I. INTRODUCTION**

SB 427, Chapter 100:2, Laws of 2004 created the Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents Thereof, Whether Referred to as Civil Unions, Domestic Partnerships, or Otherwise (hereinafter “Commission”). The Commission was established to “study all aspects of same sex civil marriage and the legal equivalents thereof, whether referred to as civil unions, domestic partnerships, or otherwise.” SB 427, Chapter 100:2, Laws of 2004.

Having convened and deliberated, we hereby present our Final Report pursuant to SB 427 Chapter 100:6, Laws of 2004.

This section was accepted by the Commission 7-4 with 1 abstention on October 31, 2005.

**II. HISTORY OF COMMISSION**

Senate Bill 427 (2004) was sponsored by Sen. Prescott, Dist 23; Sen. Barnes, Dist 17; Sen. Kenney, Dist 3; Sen. Johnson, Dist 2; Rep. Letourneau, Rock 77; Rep. Brassard, Hills 50. The purpose of the bill was twofold: 1. to recognize any legally contracted out-of-state marriage which would not be prohibited under New Hampshire law; 2. to establish a commission to examine all aspects of same sex civil marriage and its legal equivalents.

SB 427 originated in the Senate Public Institutions, Health and Human Services Committee Chaired by Sen. André Martel, Dist. 18. It passed Committee with an OUGHT TO PASS recommendation on March 4, 2004. The Committee recommendation was approved by the Senate with a roll call vote of 16-7 on March 11, 2004.

After passage in the Senate, SB 427 was referred to the House Judiciary Committee Chaired by Rep. Henry Mock, Carr. 4. The bill was amended in committee and recommended OUGHT TO PASS WITH AMENDMENT with a vote of 13-8. The House adopted the Committee’s recommendation with roll call vote of 215-137 on April 29, 2004.

Sen. Martel moved to concur with the House Amendment on May 6, 2004. On a voice vote, the concurrence was accepted by the full Senate. On May 14, 2004, Governor Craig Benson signed SB 427 into law effective upon signing.

The SB 427 Commission’s purpose and duties established in the law are explicit:

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100:2 Commission Established. There is established a commission to study all aspects of same sex civil marriage and the legal equivalents thereof, whether referred to as civil unions, domestic partnerships, or otherwise.

100:4 Duties. The commission shall examine all aspects of same sex civil marriage and the legal equivalent thereof, whether referred to as civil unions, domestic partnerships, or otherwise. The commission's study shall include, but shall not be limited to:

I. All the legal and policy implications of extending some or all of the rights and responsibilities of marriage to same sex couples.

II. Examination of all issues of civil rights, responsibilities, laws, and legal obligations related to same sex unions, including the applicability of the laws of other states to New Hampshire.

Speaker of the House Gene G. Chandler appointed Rep. Tony F. Soltani (Epsom) on June 29, 2004 as the first named House member to the Commission charged with convening an organizational meeting. Also on June 29, 2004 Reps. Maureen C. Mooney (Merrimack), James MacKay (Concord) and Paul A. Brassard (Manchester) were appointed as the House members to the Commission. Speaker Chandler appointed to the Commission Mr. Ed Butler (Hart's Location) and Mr. Scott Earnshaw (Bedford) as public members. Rep. Steve Vaillancourt (Manchester) was appointed as an Alternate House member.

Senate President Thomas Eaton appointed Sens. John S. "Jack" Barnes, Jr. (Raymond), Theodore L. Gatsas (Manchester), John T. Gallus (Berlin) and Russell E. Prescott (Kingston) to the Commission. Sen. Eaton appointed Mr. Jack Fredyma (Dover) as a public member and did not appoint a second public member before the organizational meeting.

Governor Craig Benson appointed Attorney Bryan Gould as the Governor's appointment. Mr. Brook Dupee was appointed by Commissioner Stephen of the Department of Health and Human Services to represent him. Mr. Orville "Bud" Fitch was appointed by Attorney General Kelly Ayotte of the Department of Justice to represent her.

The Chief Justice of the Superior Court and the Administrative Judge of the Probate Courts expressed in writing to Rep. Soltani their refusal to participate.

The organizational meeting was called by Rep. Soltani on July 26, 2004. At that meeting, Senator Barnes nominated Rep. Soltani as Chairman of the Commission. Sen.

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Gatsas seconded the nomination and the nomination passed unanimously. Sen. Gatsas nominated Sen. Prescott as Vice Chairman of the Commission. Rep. Mooney seconded the nomination and the nomination passed unanimously. Sen. Gatsas nominated Rep. Mooney as Clerk of the Commission. Sen. Barnes seconded the nomination and the nomination passed unanimously. *See* minutes dated July 26, 2004.

Sen. Prescott was not reelected in 2004. On April 5, 2005, Rep. Mooney made a motion to elect Scott Earnshaw Vice-Chair of the Commission. The motion was seconded by Bryan Gould. The motion carried unanimously. *See* minutes dated April 4, 2005.

On April 4, 2005, Mr. Raymond Buckley started attending Commission meetings as Governor Lynch’s appointment. Chairman Soltani recognized only Bryan Gould as the Governor's appointment. On April 28, 2005, Bryan Gould resigned from the Commission. Mr. Buckley was recognized as the Governor's appointment to the Commission.

Sen. Eaton appointed Sen. Martha Fuller Clark (Portsmouth) to the Commission replacing Sen. Russell Prescott. Sen. Eaton reappointed Sen. Prescott to the Commission as the second Senate President's public member. Sen. Fuller Clark started attending meetings on April 25, 2005.

Sen. Gatsas was elected Senate President on September 9, 2005. He subsequently appointed Sen. Bob Odell (Lempster) to take his place on the Commission effective September 19, 2005. The following members comprise the commission to date:

<b><u>Name</u></b>	<b><u>Appointed by</u></b>
Rep. Tony F. Soltani, Chair	Speaker Chandler
Rep. Maureen C. Mooney, Clerk	Speaker Chandler
Rep. Paul A. Brassard	Speaker Chandler
Rep. James MacKay	Speaker Chandler
Mr. Scott Earnshaw, Vice Chair	Public Member - Speaker Chandler
Mr. Ed Butler	Public Member - Speaker Chandler
Sen. Jack Barnes	Sen. Eaton
Sen. John Gallus	Sen. Eaton
Sen. Martha Fuller Clark	Sen. Eaton
Sen. Bob Odell	Sen. Gatsas
Mr. Jack Fredyma	Public Member - Sen. Eaton
Sen. Russell Prescott	Public Member - Sen. Eaton
Mr. Raymond Buckley	Gov. Lynch
Mr. Orville “Bud” Fitch	Attorney General Kelly Ayotte
Mr. Brook Dupee	Commissioner John Stephen – DHHS
Rep. Steve Vaillancourt	Alternate House Member – Speaker Chandler

This section was accepted by the Commission 7-4 with 1 abstention on October 31, 2005.

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### **III. SUMMARY OF COMMISSION WORK**

The Commission performed extensive and comprehensive work in an effort to formulate this final report. The Commission held business meetings on April 4, 2005, April 25, 2005, May 9, 2005, May 27, 2005, June 13, 2005, June 27, 2005, August 15, 2005, September 26, 2005, October 5, 2005, October 24, 2005, October 31, 2005, and November 7, 2005. Public testimony was taken at several of these meetings. Numerous copies of testimony, articles, reports, books, and other various materials were submitted at these meetings for the extensive file. See SB 427 Commission File Index.

At the April 4, 2005 meeting, the Commission held both a deliberative executive session to discuss possible outlines on how the tasks of SB 427 should be accomplished and also a public session to allow testimony from attendees. The Commission received public testimony with approximately 12 people speaking in favor of extending legal rights to same sex couple and 1 person spoke against. See minutes dated April 4, 2005.

At the April 25, 2005 meeting, a motion was made that the commission should hold hearings at different locations throughout the state. The Commission received public testimony with approximately 14 people speaking against extending legal rights to same sex couple and no persons spoke in favor. See minutes dated April 25, 2005. It was agreed that public hearings be held in Keene, Nashua, Littleton, and Portsmouth. See minutes dated April 25, 2005.

The first public hearing outside of Concord was held on May 31, 2005 at the Littleton Opera House in Littleton, New Hampshire. 39 people were recorded as having testified, and several others attended and submitted materials for the file. The Commission received public testimony with approximately 33 people speaking in favor of extending legal rights to same sex couple and 6 persons spoke against. See minutes dated May 31, 2005.

The second public hearing outside of Concord was held on June 22, 2005 at the Portsmouth City Hall in Portsmouth, New Hampshire. 39 people were recorded as having testified and several others submitted in written testimony or other materials for the file. The statistical analysis and summary of the testimony/research submitted for your records were as follows:

42 People submitted position paper statements.

39 people gave verbal testimony.

23 Supported gay marriage or civil unions, 15 Female [8 declared Gays], 8 Male [1 declared Gay].

19 Opposed gay marriage or civil unions, 4 Female, 15 Male.

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Nine of the 23 speakers, advocating support, openly declared themselves to be gay. Supporters offered 15 reasons for their positions but 8 of 15 were variations of perceived denied rights. Opponents offered 26 reasons for their positions. Most speakers offered a variety of reasons. The largest concentration was for reasons (1) [Stable Society 1 man & 1 woman], (2) [teaching homosexuality in public schools], & (3) [European studies show harmful results]. *See* minutes dated June 22, 2005.

The third public hearing outside of Concord was held at the Keene Public Library in Keene, New Hampshire on July 25, 2005. 46 people were recorded as having testified, and several others submitted written testimony or other materials for the file. At the Keene Hearing 46 people spoke and 8 people submitted Position Papers without speaking. Of the 46 who spoke, 27 supported gay marriage or civil unions [19 female, 8 male] and 19 opposed gay marriage or civil unions [7 female, 12 male]. In addition, 82 filed opposed gay marriage or civil unions on the blue sheets and 52 filed support on the green sheets.

Of the 19 females who supported, 7 declared that they were lesbian and 2 declared that they had homosexual children. Of the 8 males who supported, 2 declared that they were homosexuals and 1 declared that he had a homosexual child. Of the 19 who opposed gay marriage or civil unions, most declared that they had multiple children.

The supporters offered 17 reasons for their support and the most frequent by far was reason (1) [perceived denial of rights of various kinds]. Next most frequent was reason (2) Marriage is about love and commitment and (3) Homosexuality is not a choice. 9 of the 46 speakers, advocating support, openly declared themselves to be gay.

The opponents offered 26 reasons for their opposition and the most frequent was (1) [Stable Society with 1 man, 1 woman marriages]. Next were the reasons (2) Homosexuality will be taught in schools & (3) Citizens should decide the social policy and not the Courts. *See* minutes dated July 25, 2005.

The fourth and final public hearing outside of Concord was held at Nashua City Hall, later moved to the Grace Fellowship Church, in Nashua New Hampshire on August 29, 2005. Approximately 350 people attended. 204 people filled out position papers [blue or green sheets] 147 signed blue sheets opposing gay marriage or civil unions. 57 signed green sheets supporting gay marriage or civil unions. 103 People filled out Pink Sheet to speak. 68 People actually spoke, 35 left before they were called, because of the length of the hearing. Of the 103 pink sheets 81 [57 male, 24 female] were opposed to gay marriage or civil unions, 22 [7 male, 15 female] supported gay marriage or civil unions.

Included in the 81 opposed to gay marriage or civil unions were: 1 homosexual [male], 1 ex-homosexual [married with children] and 1 ex-lesbian, 6 ministers or priests, 2 NH representatives, 3 representatives of charitable organizations, 1 jailed parent [parent's rights], 1 person whose brother died of AIDS, and 1 Unitarian.

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Twenty-two [15 female, 7 male] appeared in support of same sex marriage, including: 4 homosexuals [male, 1 married, 1 Lutheran], 5 lesbians [3 with children], 1 ex-lesbian, 5 Unitarians, 1 NH representative, 1 psychologist].

Those supporting offered reasons (1) [perceived denial of rights]; (2) [Homosexuals are victims of discrimination], (3) [Same Sex Unions do not threaten my marriage], and (4) [Marriage is not State of NH Business].

Those opposed offered reasons (1) [stable society, 1 man & 1 woman], (2) [Homosexuality differs from race], (3) [Legalization of same sex marriage will decrease marriages and increase co-habitation & polygamy], (3) [Gay agenda indoctrination pushed onto kids & society], (4) [Health/Diseases of Gays] *See* minutes dated August 29, 2005.

Chairman Soltani announced at the August 15, 2005 meeting that two days would be permitted to hear expert testimony. After reviewing résumés of proposed experts, the following experts were invited by the Commission to testify on either September 12, 2005 or September 19, 2005:

- Eleanor Vander Haegan (Sociologist) to report on the history of marriage throughout the ages and in various locations. Recommended by Rep. Vaillancourt.
- Prof. Barbara Cox (Professor of law; interstate recognition and conflicts of law, California Western School of Law) would focus on conflict of law issues. Recommended by Commissioner Butler.
- Prof. Nancy Cott (Department of History, Harvard University) has studied women's issues extensively. Recommended by Commissioner Butler.
- Michele Granda (Staff Attorney for GLAD in Boston) has done research on the impact of same-sex marriage laws in New Hampshire. Recommended by Commissioner Butler.
- Prof. Dick Hesse (Professor of Constitutional Law at FPLC) would focus on issues of state constitutional law. Recommended by Commissioner Butler.
- Christine Barney, MD (Former President of the NH Psychiatric Society) is a psychiatrist in New Hampshire and will emphasize science in her testimony. She will address the nature v. nurture subject of homosexuality. Recommended by Rep. MacKay.
- Mark Perriello (Ex-gay from NH, lives in DC) has experience in reparative therapy having gone through it himself. Recommended by Rep. Mackay.

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- Dennis Bobilya (Biologist at UNH, Associate Professor in Animal and Nutritional Sciences) has performed studies of homosexuality. He is a biologist and would address the effects of homosexuality in nature. Recommended by Rep. MacKay.
- Dr. John Diggs, Jr. (Physician from Massachusetts) would address the impact of homosexuality in society specifically addressing health issues. Recommended by Commissioner Fredyma.
- Dwight Duncan, Esq. (Professor of Law, Canon Lawyer) has filed numerous legal briefs in cases regarding same-sex marriage issues. Recommended by Commissioner Fredyma.
- Rep. Phillip Travis (Massachusetts State Representative) has filed the Marriage Affirmation and Protection Act in Massachusetts and is a proponent of the Reciprocal Benefits Contract Act. Recommended by Commissioner Fredyma.
- Dr. Ellen Perrin (Medical Director of Center for Children with Special Needs, Developmental Behavioral Pediatrician Tufts – New England Medical Center) is an internationally known scholar on issues of pediatrics and was the lead author on a report related to same-sex parenting. Recommended by Commissioner Buckley.
- Steve Varnum (Children’s Alliance of NH) would address the effects of same-sex marriage on children. Recommended by Commissioner Buckley.
- Susan Hassan, Esq. (Attorney with Getman, Stacey, Schulthess & Steere in Bedford) has experience in domestic relations law involving same-sex couples in Massachusetts and New Hampshire. Recommended by Commissioner Buckley.
- Lee Badgett (Associate Professor, Dept. of Economics at University of Massachusetts Amherst) is a co-founder and researcher of the Institute for Gay and Lesbian Strategic Studies. Has conducted several studies on the fiscal impact of allowing same-sex couples to marry in various states. Recommended by Commissioner Buckley.
- Jeffrey Satinover, MS, MD (Psychiatrist) has practiced psychoanalysis and psychiatry for more than 19 years. He is a former Fellow in Psychiatry and Child Psychiatry at Yale University and a past president of the C.G. Jung Foundation. He will focus on nature v. nurture issues. Recommended by Commissioner Earnshaw.
- Maggie Gallagher (Institute for Marriage and Public Policy) is a nationally syndicated Columnist, and the author of three books on marriage. National Journal named her to the 2004 list of the most influential people in the same-sex marriage debate and has researched international same-sex marriage laws. Recommended by Commissioner Earnshaw.

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- Daniel Cere (Director of the Newman Center and Co-Director for the Newman Institute of Catholic Studies at McGill University) will address ethics and marriage issues. Recommended by Commissioner Earnshaw.
- Craig Bensen, M.Div., D.Min. (Pastor of the Cambridge United Church in Vermont) has extensive experience debating the same-sex marriage issue. Recommended by Commissioner Earnshaw.
- A representative from the Vermont Attorney General's Office has been invited by Commissioner Fitch, but has suggested an attorney in private practice instead who is familiar with Vermont civil union laws. Commissioner Fitch will continue to contact him to appear.
- Rep. Byron Rushing (Massachusetts State Representative) will address marriage related issues in Massachusetts and New Hampshire and civil rights issues. Recommended by Commissioner Butler.
- Margaret Walsh (Sociologist at Keene State College) will discuss social issues related to same-sex marriage. Recommended by Rep. Vaillancourt.

The following experts testified on September 12, 2005:

<u>NAME</u>	<u>SUMMARY OF CREDENTIALS</u>	<u>POSITION</u>
Ellen Perrin, M.D.	Professor of pediatrics at Tufts-New England Medical Center and the director of the Division of Developmental-Behavioral Pediatrics and the Center for Children with Special Needs	Supports same-sex marriage; <i>See</i> written testimony in file.
Maggie Gallagher	Affiliate scholar at the Institute for American Values and a co-author of <i>The Case for Marriage</i> .	Opposes same-sex marriage; See University of St. Thomas Law Journal, Fall 2004, Vol. 2. No. 1 in file.
Professor Dick Hesse	Professor Emeritus at Franklin Pierce Law Center in Concord, New Hampshire. Professor Hesse graduated from Georgetown University Law Center, practiced and taught constitutional law and human rights for thirty-five years, and litigated civil rights cases in the federal courts including the United States Supreme Court. He was twice awarded the Bill of Rights Award by the New Hampshire Civil Liberties Union, and he served for five years on the New Hampshire Human Rights Commission.	Supports same-sex marriage; <i>See</i> written testimony in file.

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Craig Bensen	Graduated <i>University of Vermont</i> , B.A., 1970, Psychology/Chemistry. Graduated <i>Gordon-Conwell Theological School</i> , M.Div. 1973, D.Min. 1993. Pastor, <i>Cambridge United Church</i> , 1977-present.	Opposes same-sex marriage.
Dr. John R. Diggs, Jr.	Board-certified Internist; 15-plus years of clinical experience; Co-Chair, <i>Massachusetts Physicians Resource Council</i>	Opposes same-sex marriage.
Mark Perriello	Human rights campaign PAC Manager.	Supports same-sex marriage.
Professor Dennis Bobilya	Associate professor of animal and nutritional sciences at the University of New Hampshire	Supports same-sex marriage; <i>See</i> written testimony in file.
Steve Varnum	Children's Alliance of NH Public Policy Director	Supports same-sex marriage; <i>See</i> written testimony in file.

The following experts testified on September 19, 2005:

<u>NAME</u>	<u>BACKGROUND</u>	<u>POSITION</u>
Professor Nancy Cott	Jonathan Trumbull Professor of American History and Lily Pforzheimer Foundation Director of the Schlesinger Library on the History of Women in America at Program of History of American Civilization at Harvard University; Author of <i>Public Vows: A History of Marriage and the Nation</i> (2000).	Supports same-sex marriage; <i>See</i> written testimony in file.
Rep. Philip Travis	University of Massachusetts at Dartmouth, B.S.; Bryant College, M.B.A.; Democratic Massachusetts State Representative Fourth Bristol. - Consisting of precinct 1, of the town of Norton, the towns of Rehoboth and Seekonk, and precincts 1, 3, 4 and 5, of the town of Swansea, all in the county of Bristol.	Opposes same-sex marriage; <i>See</i> written testimony in file.
Attorney Susan Hassan	B.S. from Lynchburg College, her M.S. from Illinois State University and her J.D. from Franklin Pierce Law Center.; Attorney with Getman, Stacey, Schulthess & Steere in Bedford.	Supports same-sex marriage; <i>See</i> written testimony in file.

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Professor Barbara Cox	J.D., <i>cum laude</i> , University of Wisconsin B.A., <i>cum laude</i> , Michigan State University; Professor of Law at California Western School of Law at San Diego.	Supports same-sex marriage; <i>See</i> written testimony in file.
Rep. Byron Rushing	New York City and Syracuse Public Schools; Harvard College, M.I.T.; Democratic Massachusetts State Representative Ninth Suffolk. - Consisting of precinct 2 of ward 2, of the city of Cambridge, in the county of Middlesex; and precincts 2, 3, 4, 5, 6 and 7 of ward 4, precincts 2 and 10 of ward 5, and precincts 1, 2 and 3 of ward 9, of the city of Boston, in the county of Suffolk.	Supports same-sex marriage; <i>See</i> written testimony in file.
Professor Lee Badgett	Ph.D. in Economics, University of California at Berkeley, 1990; Associate Professor of Economics at UMASS; the research director of the Institute for Gay and Lesbian Strategic Studies, a non-profit think tank.	Supports same-sex marriage; <i>See</i> written testimony in file.
Dr. Marshall Forstein	Middlebury College, B.A. 1971 College of Medicine, University of Vermont 1980; Assistant Professor of Psychiatry, Harvard Medical School Director of Psychiatric Residency Training	Supports same-sex marriage; <i>See</i> written testimony in file.

The complete file and File Index can be found in the House Clerk's Office.

This section was accepted by the Commission 7-4 with 1 abstention on October 31, 2005.

#### **IV. ISSUES OF PUBLIC CONCERN**

##### **A. ISSUES RAISED BY PUBLIC FOR SAME SEX UNIONS UNDER NH LAW**

The Commission in order to review the possible issues involving legal recognition of adult same sex unions took testimony from the public in Concord (4/4/05 & 4/25/05), Littleton (5/31/05), Portsmouth (6/22/05), Keene (7/25/05), and Nashua (8/29/05). This section deals with the issues raised by same sex unions regarding potential changes in current laws that are perceived as either discriminatory or unavailable to same sex unions. A summary of issues raised by same sex unions in each of these hearings is listed below. A complete analysis of each meeting is included in the appendix of the report for the record. We note that many people raised issues that cannot be addressed under New Hampshire law due to federal preemption. This is discussed in the second part of this section.

In addition, issues raised in public testimony by those opposed to legal recognition of same sex unions are discussed later in this report under the public policies that would be affected. Finally, upon review of both federal and state laws on marriage, next of kin, husband, and spouse we note that these sections are sometimes inaccurately collectively referred to as benefits when many of these provisions impose obligations, restrictions or penalties upon married persons.

##### **1. Summary of Issues Raised In NH Meetings by Same Sex Unions**

- Concord – 4/4/05

- a. Health insurance for State workers
- b. Hospital visitation
- c. Joint or 2 parent adoption for children
- c. Pension eligibility
- d. Homestead exemption and estate inheritance
- e. Joint ownership automobile and insurance
- f. Remove social stigma or marginalization as 2<sup>nd</sup> class citizens

- Littleton – 5/31/05

- a. Hospital visitation
- b. Joint or 2 parent adoption for children
- c. Homestead exemption and estate inheritance
- d. Remove social stigma or marginalization as 2<sup>nd</sup> class citizens

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- Portsmouth – 6/22/05
  - a. Health insurance
  - b. Hospital visitation.
  - c. Joint or 2 parent adoption for children
  - d. Remove social stigma or marginalization as 2<sup>nd</sup> class citizens
  
- Keene – 7/25/05
  - a. Health insurance
  - b. Hospital visitation.
  - c. Joint or 2 parent adoption for children
  - d. Remove social stigma or marginalization as 2<sup>nd</sup> class citizens
  
- Nashua – 8/29/05
  - a. Health insurance
  - b. Hospital visitation.
  - c. Joint or 2 parent adoption for children
  - d. Immigration for partner
  - e. Remove social stigma or marginalization as 2<sup>nd</sup> class citizens

**B. ISSUES RAISED BY PUBLIC FOR SAME SEX COUPLES THAT ARE  
UNAVAILABLE UNDER NH LAW**

The Commission in receiving testimony from the public heard much discussion of issues involving areas of federal law and government social programs for same sex couples that are not determined by New Hampshire law. The Commission will not make recommendations in areas pre-empted by federal law. In addition, many supporters of legal recognition of same sex union seek changes in the law to counter society's perceptions of same sex unions and homosexuality. The Commission recognizes that law inherently has a normative purpose, but we believe it is inappropriate for the state to adopt the view that homosexuality is moral in light of the significant disagreement on this topic among its citizens. Thus, the Commission declines any finding, explicit or implicit, as to the morality of homosexuality.

First, under the 1996 Defense of Marriage Act (DOMA), for federal purposes, "spouse" is deemed an opposite gender of an applicant and marriage is defined as a union of one man and one woman. Where this federal definition applies, New Hampshire is powerless to affect federal law. Thus, New Hampshire cannot change the definition of marriage for any of the following purposes: (1) Group Health Insurance (ERISA & COBRA), (2) Group Retirement & Pensions (ERISA), (3) Immigration, (4) Social Security Benefits and Survivor Rights & Social Security Disability Benefits, (5) Family Medical Leave Act, and (6) Federal Income Tax filing and Spousal Exemption for Estate Tax.

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**1. 1996 Federal Defense of Marriage Act (DOMA)**

The Federal Defense of Marriage Act (DOMA) signed by President Clinton in 1996 provides that under federal law, marriage means the union between a man and a woman. A spouse is defined as a person of the opposite gender who is a husband or wife<sup>12</sup>. In addition, the Federal Defense of Marriage Act (DOMA) also provides that the Full Faith and Credit Clause of the U.S. Constitution does not required states to recognize same sex marriages performed in another State<sup>13 14</sup>:

No State...shall be required to give effect to any public act, record, or judicial proceeding of any other State...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...or a right or claim arising from such relationship

**2. Health and Dental Insurance**

**ERISA**

The Federal Employee Retirement Income Security Act (ERISA) of 1974 preempts the application of State insurance laws to a self-insured employee benefit plan that is funded by the general assets of an employer. First, ERISA applies to an employer providing health coverage through a group policy, but not to an employer who self-insures health benefits. Thus, a State cannot enact legislation that would require a private employer to extend greater rights to participate in ERISA covered benefit plans. There are also limits to ERISA preemption of State law. In particular, employee benefit plans maintained by a governmental or church employer normally falls outside of ERISA entirely. Moreover, ERISA does not preempt State laws that regulate insurance. Public employers that are self insured are not regulated by ERISA. In these instances it may be possible to have local or State law cover domestic partners of same sex unions. It is also important to note that currently no State law requires an employer to provide health insurance to its employees.

Finally, not all employee benefits are governed by ERISA. For example, paid time off arrangements, adoption assistance programs, educational assistance programs and uninsured short-term disability plans generally are not governed by ERISA. In these situations, State and local laws will not be preempted, and employers will be subject to State and local coverage requirements.

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<sup>12</sup> 1 USC Section 7

<sup>13</sup> US Constitution Article IV, Section I

<sup>14</sup> Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

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COBRA

The Consolidated Omnibus Reconciliation Act of 1985 (COBRA) requires employers to offer to qualified beneficiaries who lose coverage due to a qualifying event (ex. being fired or laid off) the opportunity to self pay for a limited amount of time. It is important to understand that COBRA is a federal law. ERISA, the federal law that regulates COBRA continuation coverage in conjunction with the Internal Revenue Code, permits only "qualified beneficiaries" to receive COBRA benefits. Under IRS 1999 final regulations, a qualified beneficiary is defined only as a covered employee, the spouse of a covered employee, or the dependent child of a covered employee. Under federal law, qualified beneficiary does not include same sex persons in domestic partnerships. An employer may decide as a policy matter whether to cover same-sex partners. If an employer or State or local jurisdiction does offer COBRA like benefits to same sex unions in the form of domestic partnerships, it does not mandate protections under COBRA for enforcement. Such laws may be challenged in the courts on the ground that they are preempted by ERISA, the federal law that governs employee welfare benefits plans.

FLEXIBLE SPENDING ACCOUNTS (FSA)

Flexible Spending Accounts (FSA) are savings accounts funded with pretax dollars that can be used to pay for medical expenses, including over-the-counter medications. Domestic partners are eligible to use an employee's FSA only if the domestic partner is also a dependent under IRS Code § 152. Domestic partners that do not qualify as dependents are not eligible for an employee's FSA reimbursements.

CAFATERIA PLANS

Cafeteria plans allow employees to purchase benefits with before-tax dollars through payroll deduction. Since cafeteria plans are a creation of federal law, employers do not have to offer the same benefits to same-sex spouses as they do to opposite sex spouses. In fact, some authorities have opined that to allow employees to use these plans on behalf of same-sex spouses would cause all contributions to the plan to become taxable.

FEDERAL TAXATION

The cost of health insurance benefits provided by employers to their employees (and family members) is generally exempt from federal income taxation under Sections 105 and 106 of the Internal Revenue Code (Code). DOMA makes clear that this exemption will not apply to a same-sex spouse, unless the spouse is also a tax "dependent" of the employee. Thus, an employee who elects health insurance coverage for a same-sex spouse will have taxable income equal to the value of the coverage.

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There may be tax consequences to the employee if an employer provides domestic partner coverage and pays for all or a part of the benefits. The issue is whether the domestic partner is a “spouse” or a dependent of the employee within the meaning of IRS Code § 152. In that case, the employer may provide benefits tax free; if not, the employee must be taxed on the benefits or pay for the benefits that are provided to the domestic partner. The employee must be taxed on the “fair market value” of the coverage for the domestic partner, less any after-tax amounts paid by the employee. Some States, such as California, make domestic partner coverage tax-free for State tax law purposes.

To qualify as a spouse for Section 152 purposes, there must be a “legal union between one man and one woman as husband and wife” as set forth in the DOMA. That means an employee’s “same-gender domestic partner does not qualify as the ‘spouse’ of the employee” under the IRS code. A domestic partner, however, may be a dependent within the meaning of the code.

A dependent under IRS Code § 152 is defined as someone who “receives more than half of his or her support from the taxpayer for the tax year and who has the home of the taxpayer as his or her principal abode and is a member of the taxpayer’s household during the entire taxable year of the taxpayer.” See IRS Private Letter Ruling No. 2003-39001 (June 13, 2003); IRS Code § 152(a)(9). An individual is not considered a member of the taxpayer’s household, however, if the relationship violates local law. See IRS Code § 152(b)(5).

### 3. Pensions and Retirement Plans

Retirement plans are also regulated by the federal Employee Retirement Income Security Act (ERISA) of 1974 and are not obligated to cover persons in same sex marriages or domestic partnerships as a qualified beneficiary. Examples of areas that are not covered for same sex unions include: (1) A Qualified Domestic Relations Order (QDRO) extending retirement benefits to a former spouse is not valid to require an ERISA retirement plan to transfer benefits to a same sex former spouse; (2) A same sex spouse cannot roll over a deceased spouses benefits to an IRA or other equivalent retirement plan; (3) Certain types of distributions (the "joint and survivor annuity" and the "pre-retirement survivor annuity") are not available to same sex couples.

### 4. Social Security Benefits & Social Security Disability Benefits

The Federal Defense of Marriage Act (DOMA) signed by President Clinton in 1996 provides that under federal law, marriage means the union between a man and a woman. A spouse is defined as a person of the opposite gender who is a husband or wife. Under federal law, same sex persons in a same sex marriage (Massachusetts) or a domestic partnership are not eligible as qualified spouses or dependents for Social Security or Social Security Disability Benefits.

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5. Family Medical Leave Act (FMLA)

Under federal law, employers are allowed to grant employees up to 12 weeks of unpaid leave to care for themselves, a spouse, a relative, or an in-law of a spouse in a 12-month period. The Federal Defense of Marriage Act (DOMA) signed by President Clinton in 1996 provides that under federal law, marriage means the union between a man and a woman. A spouse is defined as a person of the opposite gender who is a husband or wife. Under federal law, same sex persons in a same sex marriage (Massachusetts) or a domestic partnership are not eligible as a qualified spouses or a dependent relative.

6. Federal Immigration

The Federal Defense of Marriage Act (DOMA) signed by President Clinton in 1996 provides that under federal law, marriage means the union between a man and a woman. A spouse is defined as a person of the opposite gender who is a husband or wife. Hence, persons who are non-residents of the United States and are homosexual, cannot be made a resident by a legal same sex union of either a same sex marriage (Massachusetts) or a domestic partnership (California, Connecticut, Washington DC) or a civil union (Vermont) where federal preemption exists.

7. Federal Income Tax Filing and Estate Tax

The Federal Defense of Marriage Act (DOMA) signed by President Clinton in 1996 provides that under federal law, marriage means the union between a man and a woman. A spouse is defined as a person of the opposite gender who is a husband or wife for purposes of both filing federal tax returns and qualifying for spousal exemption under federal estate inheritance taxes. Same sex couples are not entitled to file joint income tax returns or a spousal exemption for inheritance from their domestic partner.

**C. REVIEW OF PERCEIVED DENIAL OF BENEFITS TO SAME SEX COUPLES UNDER BOTH FEDERAL AND STATE LAWS OF NH**

We received testimony at the public hearings by supporters of legal recognition of same sex unions referencing the 1,000 plus Federal benefits given to married couples as compared to single persons or same sex couples. A review of this subject has been conducted by the Institute for Marriage and Public Policy at [www.imapp.org](http://www.imapp.org). The Institute published an executive summary entitled “1,000 Federal Benefits of Marriage. An Analysis of the 1997 GAO Report” by Joshua K. Baker.” In addition, on 9/12/05 Maggie Gallagher of IMAPP appeared before the Commission and discussed this report and its analysis, affirming that the claim that marriage invokes 1,000 benefits is misleading.

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To summarize, though marriage is used in legislative classification, not all the 1,000 plus referred to Federal statutes are actual benefits to all persons at all times in a marriage. First, there are examples of laws where marriage acts as a penalty for areas of means tested eligibility requirements for Medicaid, welfare, and housing assistance, as in the Federal tax code or administration of public services. However, there are areas where economic treatment is seen as favorable, as found in pensions, health insurance, and estate inheritance to spouses. Thus, the claim that same sex couples are denied over 1,000 benefits of marriage is misleading.

Second, the Commission was given a report (4-04-05) with a list of all New Hampshire laws with the terms "Marriage", "Husband", "Wife", "Relative", "Spouse", "Husband", "Wife", "Next of Kin", and "Family" from attorney Michele Granda from Gay Lesbians Advocates and Defenders (GLAD) and the New Hampshire Freedom to Marry. Approximately 399 statutes were identified. However, as found in the analysis for federal laws, it is misleading to claim that same sex unions are denied 399 benefits under State law compared to married couples.

- Approximately 130 of the statutes listed involve the regulation of marriage, annulment, divorces, and/or involve issues of marriage benefits that are preempted under federal statutes for issues that are outside of New Hampshire regulation.
- Approximately 10 statutes involve the recording, tracking, and maintenance of marriage licenses. Several statutes also confer jurisdiction to the Probate and Superior Courts regarding marriage administration.
- Approximately 68 statutes involve recognizing rights of persons that are next of kin and codify a spouse as a next of kin for a variety of property rights and privileges.
- Approximately 72 statutes impose penalty to spouse for married couples. Examples of this include (a) Eligibility for public assistance and notice of assignment of liens/levy, (b) Disqualification for various State professions boards and licensing, (c) Notification of health risks for HIV and Fetal Alcohol Syndrome to applicants, and (d) Including definition of affinity to a spouse for purposes of protection of minors against sexual assault.

In summary, as found in a review federal law, many New Hampshire State statutes do not extend benefits and many are also intertwined with existing protections for other family arrangements such as next of kin. Thus, only about 1/2 of the 399 statutes listed are actually benefits compared to unmarried persons.

This section was accepted by the Commission 7-4 with 1 abstention on October 31, 2005.

## FINAL MAJORITY REPORT

### V. FINDINGS

#### A. **THAT GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH, 440 MASS. 309, 798 N.E.2D 941 (2003) WAS INCORRECTLY DECIDED BECAUSE THE DECISION GOES BEYOND THE PROPER SCOPE OF JUDICIAL DECISION MAKING AND ENCROACHES ON POLICY AREAS PROPERLY RESERVED FOR THE LEGISLATURE.**

In the United States only one state, Massachusetts, has gone so far as to rule that same sex couples are entitled to the exact rights and privileges as heterosexual marriage. The recent judicial decisions that mandate same sex marriage provide a stark contrast to the established legal history in the United States where the promotion of marriage has been recognized consistently as a valid governmental interest. The legislative branch has long regulated and promoted the benefits and rights that derive from the institution of marriage. Courts have consistently and routinely recognized the appropriate exercise of legislative power and regulation.

As an important social institution, marriage serves a number of interconnected purposes including the procreation and protection of children. “The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to their mother and father.”<sup>15</sup> A recent report on family law set out the purposes of marriage this way:

Marriage serves a number of critical purposes in human culture. It addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a public form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance. It provides a social frame for procreativity. It fosters and maintains connections between children and their natural parents. It sustains a complex form of social interdependency between men and women. It supports an integrated form of parenthood, uniting the biological (or adoptive), gestational, and social roles that parents play.<sup>16</sup>

In this view, marriage is not merely a private commitment of two people, but a complex web of relationships and principles that bring a man and a woman together for the purpose of creating and raising children.

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<sup>15</sup> Maggie Gallagher, “(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman,” 2 U. of St. Thomas L.J. 33, 44 (2004).

<sup>16</sup> Daniel Cere, “The Future of Family Law – Law and the Marriage Crisis in North America” (2005) p.20.

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Does the definition of marriage make a difference? The Commission agrees with Daniel Cere that “[m]eaning matters, and the institutions that bear it serve to structure our experiences and to steer them in a particular direction.”<sup>17</sup> Changing the meaning of marriage erodes the strength and integrity of the institution. You change the institution itself. Many supporters of gay marriage recognize that re-engineering the meaning of marriage involves a profound shift in our understanding of the institution. As Ladelle McWhorter acknowledged:

[Heterosexuals] are right, for example, that if same-sex couples can get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well.<sup>18</sup>

Of all the family structures that have been well-studied, using large, representative databases, families with a married father and mother and their children outperform all other families studied, including single parents, stepfamilies, unmarried biological parents, and cohabiting families.<sup>19</sup> The family with a married biological mother and father leaves the rest behind in terms of psychological development, self-esteem, academic performance, and engagement in risk behaviors such as drugs or early sex.<sup>20</sup> The research confirming the importance of married biological parents is extensive.<sup>21</sup> The scholarly consensus on family structures is summed up as follows:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.<sup>22</sup>

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<sup>17</sup> Daniel Cere, *War of the Ring*, in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* 9, 15 (Daniel Cere & Douglas Farrow eds., McGill-Queen's U. Press 2004). See also *infra* note 25.

<sup>18</sup> Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999).

<sup>19</sup> Moreover, the State has a legitimate interest in procreation. 60% of women's pregnancies are unplanned. Contraceptive failure for women aged 15-44 is 1.8 pregnancies. Testimony before the Commission of Maggie Gallagher.

<sup>20</sup> “Under every standard – educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings – children of intact marriages have fewer problems than children of broken families. . . . Not only do children need two parents; it also seems that ideally a child should have both a mother and a father.” George W. Dent, 15 *Journal of Law & Politics* at 594-95 (1999). Children recognize the difference between maleness and femaleness as early as 14 months. Young boys settle on their physical and gender role identity between 18 and 36 months of age.

<sup>21</sup> Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (Doubleday 2000); Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 *Margins* 161 (2004).

<sup>22</sup> Krisin Anderson Moor et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, <http://www.childtrends.org/files/marriageRB602.pdf> (June 2002).

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Despite the strong evidence of a the superiority of intact marriages in outcomes for children, the Commission frequently heard that same sex parenting studies purport to find that children raised by gay or lesbian couples do as well as other children. The primary reason is that most such studies compare children of lesbian mothers to those with single heterosexual mothers because those are thought to be the most relevant comparisons. As a result, these studies compare gay parenting not to the gold standard of an intact marriage of the biological mother and father, but to one of the other groups of single parents or step-parent families that score dramatically less on the outcomes that matter. There may be further reason to question these studies because they are so small and unrepresentative.<sup>23</sup>

Thus, marriage matters to children, their parents and society. The Goodridge plurality, however, overlooked or avoided much of this evidence. We take this opportunity to highlight three failures of the plurality in Goodridge.

First, the Goodridge plurality minimized the role of procreation in marriage by pointing out that not all heterosexual couples intend to or are capable of bearing children. This misses the mark. Not all heterosexual couples may be capable of bearing children, but privacy concerns provide good reasons for the government to avoid intrusive inquiries about the child-bearing intentions of couples. Moreover, many couples who do not intend to bear children do still bear them. Indeed, many couples thought to be infertile prove otherwise. Marriage is designed to deal with these unexpected results. In stark contrast, homosexual couples never generate such surprises. Same sex partners never give birth unexpectedly to their own children. Thus, marriage would play a different role with same sex partners. The deep logic of marriage defines one purpose of marriage as: “to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion’s consequences (children) begin and continue life with adequate private welfare.”<sup>24</sup> The Commission views society as the ultimate beneficiary of marriage in light of this purpose. The Goodridge plurality simply avoided this understanding of the purpose of marriage.

The Goodridge plurality also erred in failing to respond to the state’s argument that a married mother and father is the optimal child-rearing mode. Ignoring the health of the institution that is the consensus outperformer for children, the plurality instead focused exclusively on the children of existing gay couples and said there was inadequate reason for depriving their family unit of the status of state recognized marriage. There is, however, little evidence that the children of gay couples will benefit from the term of marriage simply because what they will have is not the same thing as marriage. The scholarly consensus remains that the gold standard for child-rearing outcomes is a biological father and a mother in an intact marriage. Regardless of whether or not some form of legal recognition is extended to a homosexual couple, children with gay parents will yet be deprived of either their biological mother or father or both. They will not

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<sup>23</sup> Reviewers have also questioned the objectivity of those researchers conducting the studies. See supra note 8.

<sup>24</sup> Monte Neil Stewart, “*Judicial Redefinition of Marriage*,” 21 Canadian Journal of Family Law (2004) 11, 45.

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receive the acknowledged best.<sup>25</sup> Moreover, heterosexual couples will also no longer have marriage as it has been known; instead, they will have the different, and we believe much reduced, institution of genderless marriage. This new marriage will be devoid of much of the meaning that has given marriage its vitality over the centuries.

Finally, we believe that the Goodridge plurality erred in finding that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”<sup>26</sup> Here, the court improperly adopts a new and competing social theory of marriage (as a close personal relationship) without adequate justification. Defining what marriage is and what its purposes are is inherently a legislative task. We believe that the view of marriage adopted by the Goodridge plurality presents an impoverished view of an important institution.

In contrast to the court in Goodridge, the State Supreme Courts of Oregon and New Jersey in recent court decisions involving challenges to federal DOMA law have ruled that marriage regulation falls within the power of the legislature and such legislative determinations should be given deference by the courts rather than be replaced by judicial policy determinations.

The Commission is aware of the Vermont case of Baker v. State, (1999) that triggered Goodridge v. Department of Public Health, 440 Mass. 309 (2003). The Commission made inquiries to Commissioner Bud Fitch regarding the cases of Baker v. State (1999) and Goodridge v. Department of Public Health (2003) for a comparison of both to the New Hampshire Constitution. Commissioner Fitch noted that in the case of Baker v. State (1999) the Court ruled that Vermont’s prohibitions against same sex couples could not withstand a challenge under the Common Benefits Clause of the Vermont Constitution. Commissioner Fitch noted that although there are similarities between the Vermont and New Hampshire Constitutions, New Hampshire does not have a Common Benefits Clause.

Commissioner Fitch noted that in the case of Goodridge v. Department of Public Health, 440 Mass. 309 (2003) the Court ruled that a ban on same sex marriage did not meet the rational basis test for either due process or equal protection. The Massachusetts decision was not reached on whether banning same sex marriage should be reviewed under the standard of “strict scrutiny.” Commissioner Fitch noted that although there are similarities between the Massachusetts and New Hampshire Constitutions, they are not identical. The Goodridge decision was a 4-3 decision with very strong disagreement about whether the Court had the authority to redefine marriage where marriage regulation belongs to the legislature.

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<sup>25</sup> The problem with the desire to call a same sex partner a spouse is analogous to Abraham Lincoln’s comment when a delegation came to the White House to urge his support for something he opposed. He asked the members of the delegation, “How many legs will a sheep have if you call the tail a leg?” They answered, “Five.” “You are mistaken,” Lincoln said, “for calling a tail a leg don’t make it so.” In the same way, calling the union of two men or two women a “marriage” will not make it so.

<sup>26</sup> Goodridge v. Department of Public Health, 440 Mass 309, 798 NE2d 941 (2003) 332.

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**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus

**B. REJECT THE NOTION THAT SAME-SEX MARRIAGE  
CONSTITUTES A DENIAL OF CIVIL RIGHTS COMPARABLE  
WITH LOVING V. VIRGINIA, 388 U.S. 1 (1967).**

Many advocates of same sex marriage claim that the denial of same sex marriage parallels the history of civil rights of African-Americans in Loving v. Virginia, 388 U.S. 1 (1967). The Commission rejects this comparison for the following reasons:

Same-sex marriage cases are based on rational basis and anti-miscegenation laws were grounded on prejudicial intent struck down under the strict scrutiny standard of the 14<sup>th</sup> Amendment of the U.S. Constitution. Same sex marriage has never been considered either a fundamental right or an essential element of society's fabric so as to constitute an essential liberty in New Hampshire history. The Commission made an inquiry to Commissioner Bud Fitch of the AG's Office regarding the cases of (a) Baker vs. State (1999) and Goodridge vs. Department of Public Health, 440 Mass. 309 (2003) requesting a comparison to New Hampshire's Constitution. Commissioner Fitch produced a memo on these topics for the Commission and noted that same sex marriage has never been a fundamental right under the definition of ordered liberty by the Supreme Court and recent State and Federal Courts involving challenges to bans on same sex marriage."

Race is considered a suspect class under constitutional law in light of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments of the U.S. Constitution. Same gender adult sexual relations have never been a fundamental right and neither has same gender marriage under the U.S. Constitution or the Constitutions of the several States.

Race is an immutable and an innate characteristic and not something that is acquired and is changeable. Sexual orientation, on the other hand, may not be immutable or innate. Sexual orientation involves both a broad criteria and is not always intrinsically related to a specific sexual behavior or expression.

The Commission further finds that the discrimination built into the very definition of marriage is justified by the qualitative differences between same sex couples and man/woman couples. Four such differences are discussed below.

First, same sex relationships are not similar to opposite-sex couples in respect of procreation. Every same sex couple is sterile as a couple.<sup>27</sup> There are no exceptions. Same sex couples must "borrow" from someone outside their relationship to have or adopt a child. This "borrowing" necessarily makes the family headed by homosexual parents a more fluid "family of choice".

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<sup>27</sup> Advocates of gay marriage frequently challenge the procreative purpose of marriage by noting that not all heterosexual marriages are fertile or are intended for procreation. That misses the point. One purpose of marriage is to ensure that unintended children are cared for within the optimal environment. Even couples who do not intend children, often bear them. In contrast, homosexual couples never give birth to unintended children. Thus, the same societal concerns do not arise. Moreover, even sterile heterosexual couples are of the type that can bear children and are thus consistent with the optimal model of child-rearing for our children. Though childless these couples, nonetheless, reinforce the normative ideal of marriage as being between a man and a woman.

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Advocates of same sex marriage recognize that their families will necessarily be different:

One feature of our experience has been an emphasis on “families we choose” anthropologist Kath Weston’s felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because same sex couples cannot have children through their own efforts, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption. The family of choice can and often does include a relationship with this third party.<sup>28</sup>

Second, same sex couples are different in terms of historical status. No great civilization has afforded same sex couples legal recognition equivalent to marriage.<sup>29</sup> Only primitive or declining cultures make the list of those that have supposedly accepted same sex relationships. The lack of historical precedent should not be considered fatal to the case for same sex marriage, but it does underscore that what same sex couples are seeking is not so much to enter into marriage as to radically redefine it.

Third, same sex couples are fundamentally different from opposite sex couples in their ability to raise children as we have already discussed. The outcomes for both children and society are likely to be different.<sup>30</sup>

Fourth, that same sex couples are fundamentally different from their opposite sex peers is highlighted by differences in such important relational characteristics as fidelity and stability. Generally, same sex relationships are not based upon the same concepts of stability and fidelity as marriage. Long before America developed civil laws to govern marriage, men and women committed to each other for life and overwhelmingly they remained faithful to each other. Despite the increase in divorce in recent decades, most married couples remain faithful. And those relationships are long-lasting.<sup>31</sup> The contrast with fidelity among homosexual men is striking.<sup>32</sup> Although disputed, we received

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<sup>28</sup> William Eskridge, Jr., *The Case for Same-Sex Marriage* 81 (1996) (footnote omitted). To identify this difference is not to suggest that gay parents are inadequate, or even that they should not be permitted to adopt and raise children.

<sup>29</sup> Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 *Cath. U.L. Rev.* 1271, 1324 (1998)(critiquing *The Case for Same-Sex Marriage* by William Eskridge); William Eskridge, Jr., *The Case for Same-Sex Marriage* 15-50 (1996).

<sup>30</sup> See supra notes 20-22 and accompanying text. See also Judith Stacey and Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? *American Sociological Review* 66 (2001): 159-183, 159.

<sup>31</sup> Nearly 60% of first marriages are expected to last a lifetime. David Popenoe and Barbara Dafore Whitehead, *The State of Our Unions: The Social Health of Marriage in America 2000*, at 27, The National Marriage Project at Rutgers (2000). [Available at <http://marriage.rutgers.edu/NMPAR2000.pdf>.]

<sup>32</sup> According to one survey, 66 percent of male couples had sex outside the relationship in the first year and nearly 90% did if the relationship endured over five years. Joseph Harry, *Gay Couples* 116 (1984). A more recent study of gay relationships in the Netherlands found that men with steady partners have on average 8 casual sex partners each year. Maria Xiridou, et al., *The Contribution of Steady and Casual*

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testimony and submissions that gay relationships are briefer and less likely to be monogamous. Gays tend to be measurably more promiscuous than their straight counterparts.<sup>33</sup> Indeed, some gays have advocated that concepts of fidelity and monogamy may have to be modified to fit within the gay culture.<sup>34</sup>

Will marriage change either the length or the nature of the homosexual relationship? Will it help same sex partners to be more committed? Will marriage vows transform two men into two husbands? That seems unlikely. Some homosexual advocates themselves state that homosexual relationships are inherently non-monogamous.<sup>35</sup> Evidence from countries that offer marriage or marriage-equivalents to same sex couples suggest that relatively few same sex couples make use of these laws and those that do are unusually prone to dissolution.<sup>36</sup>

The Commission's majority clearly finds that (a) same-sex marriage cases are based on rational basis and anti-miscegenation laws were grounded on prejudicial intent and (b) same sex marriage has never been considered either a fundamental right or an essential element of society's fabric so as to constitute an essential liberty in New Hampshire history.

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Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam, 17 AIDS 1029, 1031, Table 1 (2003).

<sup>33</sup> In concluding that claims of homosexual hyper-promiscuity were exaggerated, Eugene Volokh nonetheless estimated that the average American gay has twice as many lifetime sexual partners as does the average straight male. "Now it does appear that a significant minority of American gay males do have lots of sexual partners. Moreover, the median American gay male does have somewhat more sexual partners than the median straight male (likely ten to twenty lifetime partners for gays as opposed to five to ten for straights . . .). Quoted by Jonathan Rauch, *Gay Marriage* (Holt 2004) 143.

<sup>34</sup> "[A]mong gay men a long-lasting *monogamous* relationship is almost unknown. Indeed both gay women and gay men tend to be involved in what might be called multiple relationships. . . ." Dennis Altman, *The Homosexualization of America* 187 (1982) (emphasis in the original). Two homosexual authors reached the conclusion in their study that to be homosexual is to be non-monogamous. David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252-262 (1984). According to them, monogamy is unnatural for homosexuals and only results because of internalized homophobia. Thus, when someone learns to accept his homosexuality, he also sheds his monogamy. *Id.* In light of these statements of homosexuals, it is difficult to be optimistic about the impact of marriage upon the fidelity of homosexuals.

<sup>35</sup> See *supra* note 34. Another objection that could be made to this analysis is the absence of information on lesbian relationships. The contrast in terms of fidelity is starker for gay male couples than for lesbian couples. We note that we have heard from a number of long-lasting, committed gay and lesbian couples. These limited examples should serve to remind us that generalizations do not apply to all members of the group being described and that no generalization should be the basis for drawing conclusions about an individual relationship's characteristics such as fidelity. In other words, the fact that the vast majority of gay relationships appear to be non-monogamous provides no basis for jumping to any conclusion with respect to a specific gay couple's fidelity.

<sup>36</sup> Gunnar Andersson, et al., 2004. "Divorce-Risk Patterns in Same-Sex 'Marriages' in Norway and Sweden," paper presented at the 2004 Annual Meeting of the Population Association of America (April 3, 2004), available at <http://paa2004.princeton.edu/download.asp?submissionId=40208> (showing that gay male couples were 1.5 times as likely to divorce as opposite sex married couples, while lesbian couples were 2.67 times as likely to divorce as opposite sex married couples).

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**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

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**C. NATURE v. NURTURE CONCLUSIONS.**

The Majority of the Commission in reviewing the legal and policy implications of extending some or all of the rights and responsibilities of marriage to same sex couples, encountered frequent debate on whether homosexuality is innate or a matter of choice. This seemed relevant to some commissioners because if homosexuality were considered a choice then the argument that it was a civil right would be substantially weaker. The Commission received much correspondence from the public and also substantial research from Commissioners dealing with whether to characterize homosexuality as intrinsic and genetic.

The issues concerning sexual orientation, nature versus nurture, and research from the scientific fields may be relevant to the debate about whether to extend legal recognition to same sex unions. The Commission notes that much research has been done on these subjects by experts on both sides and that significant uncertainty persists. Within the medical and legal debate, it is challenging to find consensus on topics of nature versus nature, sexual orientation versus behavior, psychiatry and mental health, public health issues and disease.

The issue of “nature vs. nurture” came to the fore when experts disputed the relevancy of homosexuality as natural, and the health risks involved in homosexual acts. The Commission heard testimony from Professor Dennis Bobilya, at the Expert Public hearing 9/19/05 who stated he does not think there is a single gay gene, but does believe that some people are predisposed.

The Commission also received research regarding recently published data by the U.S. CDC regarding sexual orientation and sexual behaviors and also the U.S. Census that further supported the claim the population for persons that are gay or lesbian and exclusively homosexual range from 1.5-3%.<sup>37</sup>

Furthermore, the Commission heard testimony from Dr. John Diggs, MD at the Expert Public hearing 9/12/05. Dr. Diggs was specifically asked about whether he thought there was a “gay gene” and replied there is none. Dr. Diggs further presented evidence that homosexual acts are prone to transmitting disease and are biologically unnatural. The medical professional groups that have endorsed same sex marriage have taken the position after some controversy that homosexuality is not a mental health disorder based upon the absence of “impairment in judgment, stability, reliability, or general social or vocational capabilities.” This narrow statement is not inconsistent with Dr. Diggs’ view that homosexuality is unhealthy and tends to transmit disease.

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<sup>37</sup> An early estimate that homosexuals constituted 10% of the population has been discredited, these inaccurate figures appear to persist in the public consciousness over more recent and reliable figures of 3% or less.

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Furthermore, the Commission heard from several “ex-gays” who left homosexuality and do not believe that they were born gay.

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**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

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**D. RESEARCH ON CHILDREN.**

During the Commission's study of granting legal status to same gender couples, concerns about the best interest of children arose. The Commission finds that an intact family including both the biological mother and father is the optimal vehicle for raising children. This conclusion appears beyond reasonable dispute.<sup>38</sup> The limited studies that have been conducted on children being raised by homosexual single parents or same sex couples typically compare the results of those children to divorced single mothers or step families because those are thought to be the most direct comparisons. Even if the gay parents compare favorably with such suboptimal groups, those results would not support the proposition that gay parents are as effective as parents that are willing to give their children their biological mother and father.

Moreover, the long term effects of children raised by same gender parents have not been studied well enough to justify changing policies to allow joint parent adoption for non married persons other than husband and wife.

The major studies on this topic are encouraging, but questions remain and studies on existing same gender parenting remain in their infancy. Thus, State institutions for adoption and guardian policies need further research before recommending that sexual orientation or lack of gender be considered irrelevant for child development or child placement when no biological relationship exists between the prospective adoptive child and applicants.

Being denied joint parental rights and responsibility is alleged to harm the environment for children. Public testimony from gays and lesbians stated the process of adoption and guardianship currently in place are inadequate and that same sex marriage is the best way to fix this problem. However, the Commission also understands that adoption and guardianship are a state interest that cannot be taken lightly under the duties of the Commission.

The Commission notes there are generally two scenarios in which children may be involved in adoption and/or guardianship by a same sex couple. The first is a case where one partner has a child from a previous heterosexual relationship or has conceived a child though artificial reproductive technology. The second is where a childless same sex partner and/or couple is petitioning or want to co-petition for adoption or guardianship of a child that is not biologically related to either applicant. Thus, here the State is making a judgment for the best interest of the child for selecting a possible home.

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<sup>38</sup> See supra notes 20-22 and accompanying text.

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To support our findings, Dr. Ellen Perrin, MD at the Expert Public hearing on 9/12/05 stated studies on children and same sex parenting are still lacking in rigor and reliability. The Commission also received testimony from Maggie Gallagher at the Expert Public Hearing 9/12/05 that reaffirmed the weakness of current research on same sex parenting. Maggie Gallagher stated there is overwhelming and conclusive evidence, 1000+ studies that children born to a married mother and father is in the best environment for child development. Same sex marriage is not well studied as compared to the male female intact married structure, which is the gold standard.

The Commission is also aware that the Courts have ruled that the regulation of adoption and the best or optimum environment for children is clearly within the powers of the legislature. The Courts agreed with the State of Florida in upholding its ban on adoption by homosexual couples in the case of Lofton vs. Secretary of the Department of Children and Family Services, D. C. Docket No. 99-10058-CV-JLK for the U.S. Court of Appeals of the 11<sup>th</sup> Circuit (2004).

The Commission received testimony from Steve Varnum, Children's Alliance of NH at the Expert Public hearing on 9/12/05. Mr. Varnum addressed the needs of children regarding same sex parenting situations, but also noted that the number of children in same sex adult cohabitating environments was relatively small. Thus, research on same gender parenting will be difficult to accomplish because the pool of potential participants remains small.

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**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

**E. CASCADE EFFECT OF LEGAL RECOGNITION OF SAME SEX MARRIAGE.**

Opponents of gay marriage raised legitimate concerns regarding the potentially unintended side-effects or cascade effects of adopting gay marriage on religious freedoms, parental rights and public education, private groups and public access, and medical issues involving public health.

The Commission also received expert testimony from a variety of sources, particularly those from the States of Massachusetts and Vermont that reaffirmed many of the public's concerns about cascade effects resulting from the granting of legal status to same sex marriage. The Commission also received a variety of correspondence from the public and research from individual Commissioners regarding cascade effects in both other States and foreign jurisdictions.

The Commission received a variety of testimony, research, and data to support a major concern the public has regarding the introduction of teaching of homosexuality in the public schools without parental oversight or consent. The Commission also heard from David Parker of Lexington, Massachusetts, a father in Massachusetts at the Nashua Public Meeting on 8/29/05. He was arrested when he objected to a school's handouts on diversity and sexual orientation given to his kindergarten-aged son. Teachers and schools may use legalized same sex marriage as a defense to supersede parental rights in schools. National Public Radio reported that public school teachers in Massachusetts are now more emboldened to speak out on homosexuality and include gay friendly elements in the curriculum. One such teacher said: "In my mind, I know that, 'OK, this is legal now.' If someone wants to challenge me, I'll say, 'Give me a break. It's legal now.'"

The Commission is also aware of these issues being raised in Canada. In Canada, a lawsuit or complaint has been filed requiring inclusion of homosexuality in classroom educational material. The schools cannot ban books with gay-friendly themes from kindergarten classes, said Canada's Supreme Court in a December 2002 ruling. The ruling was the result of a lawsuit brought by a gay kindergarten teacher who wanted to introduce a book entitled "One Dad, Two Dads, Brown Dads, Blue Dads" to kindergarten and first-grade students.

The Commission's study of granting legal status to same gender couples and concerns about legal policies concerning the same sex couple extends both to public policies and the effects on the private and public institutions such as employers or employees, private groups, commerce, religion, and government. The issue of cascade effects is not to be dismissed, especially when it involves other constitutionally protected rights. Thus, a legitimate concern is raised when persons have objected to homosexuality from the confines of their own homes and outside of their employers and have lost their jobs when exercising either free speech or religious beliefs.

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**F. INTERSTATE COMMERCE EFFECT OF SAME SEX COUPLES.**

The Commission recognizes that SB 427 does not recognize the legal rights of the adults of the same gender to be considered “spouses” under the law. However, NH law does not deny rights to gays or lesbians as a class and in many cases grants protections for sexual orientation (RSA 354-A:8). Child adoption or guardianship are not barred under New Hampshire laws RSA 170-B:4 and RSA 463:10.

The Commission’s study of granting legal marriage to same gender couples and concerns about legal policies concerning the same sex couples extends across state borders in both directions. An interstate transit scenario such as where a Massachusetts homosexual couple is going to Canada, Vermont, or Maine raises the question of what rights does New Hampshire recognize for such a couple?

The second interstate transit scenario would involve New Hampshire residents traveling to other states. In both cases the legal issues are complex and evolving, but the Commission recommends the following: (1) legally married or legally recognized civil unions in foreign jurisdictions with children may be deemed co-guardians, see RSA 463:10, III; 463:30; 463:32-a; and (2) NH law cannot extend outside of NH because of Federal DOMA, but mutual recognition might be sought through developing uniform laws such as through The National Conference of Commissioners on Uniform State Laws.

Even if the New Hampshire legislature wanted to pass legislation to grant same sex couples the same rights as heterosexual married couples, or civil unions or domestic partnerships, they would not be recognized under the Federal Defense of Marriage Act of 1996 (DOMA) and/or the 44 individual States that have statutory and/or constitutional language. Furthermore, a supermajority of the States ban same sex marriages and eighteen ban any legal recognition of same gender relationship whether civil unions or domestic partnerships.

The Commission in the present situation can only suggest that rights that are contractual in nature be explored individually. To do so need not require that same gender sexual relations be recognized. Examples of the previous section discussing “joint guardianship” are examples of rights that can be incorporated under State laws for possible reciprocal recognition by foreign States but not trigger a state DOMA.

This section was accepted by the Commission 7-5 on October 31, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

## VI. RECOMMENDATIONS

### A. ANY CHANGE IN THE PUBLIC POLICY REGARDING MARRIAGE MUST BE MADE BY ELECTED REPRESENTATIVES OF THE PEOPLE AND THE PEOPLE OF NEW HAMPSHIRE.

The Commission finds that marriage deserves its special status in law and society in the State of New Hampshire, because marriage performs a unique and irreplaceable social function: it encourages men and women to create and rear their children together. Marriage matters for many reasons but the most important one is this: marriage aims at creating the next generation and is the only context in which children can be known and loved by their own biological mother and father.

The Commission notes that there are various legal advocacy groups attempting to redefine marriage via legal challenges through the Courts. These challenges have been a 30 year effort to change social policies incrementally. They are designed to achieve acceptance and legal protections for gay and lesbians. More recently, in lawsuits in Hawaii (1993), Alaska (1996), Vermont (1999), and finally Massachusetts (2003), courts have been asked to rule that marriage defined as a heterosexual only institution is unconstitutional. The most significant case has been the recent Massachusetts case in Goodridge vs. Department of Public Health, 440 Mass. 309 (2003). Finally, over a dozen lawsuits attempting to redefine marriage are pending in the United States, including in the states of California, New York, Connecticut, New Jersey, Nebraska, Oregon and Washington.

Attempts to redefine marriage have not been limited to the United States. In 2003, Canada's Supreme Court ruled that marriage defined as a man and woman was unconstitutional. As result, Canada now has same sex marriage as result of judicial decision and not the vote of the people. A survey of other countries finds similar patterns of attempts to change marriage by judicial fiat instead of representative democratic process.

The Commission notes that the Massachusetts experience of Goodridge vs. Department of Public Health, 440 Mass. 309 (2003) reflects the attempt to use judicial mandate as a replacement for representative government. The Commission received testimony from Rep. Philip Travis, Massachusetts State Representative at the Expert Public Hearing on 9/19/05. The history of the Massachusetts Marriage Amendment goes back 3 ½ years when in 2002, over 130,000 persons signed a ballot initiative to define marriage as union of one man and one woman. The Senate President in the State's Constitutional Convention adjourned the session without a vote. In this vote, 53 voted not to go into recess. A lawsuit was filed and the Massachusetts Supreme Judicial Court ruled that the legislature violated the law but offered no remedy where the legislative period had ended.

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The Massachusetts Supreme Judicial Court ruled in Goodridge that there was no rational basis to deny marriage to two persons of the same gender who are sexually intimate. The Goodridge decision was made by a 4-3 vote and included several dissents that the Commission finds persuasive. Such judicial activism strikes at the heart of a democratic republic where the system of government rests upon three equal branches with checks and balances of each under the Constitution.

**ANALYSIS AND CONCLUSIONS**

The Commission finds that the definition of marriage, particularly whether marriage should be redefined as genderless, is the kind of policy decision which should be decided by the legislature and not by the courts. The Commission trusts that the excesses of the court in Goodridge are evident enough to discourage other courts from such unwarranted judicial activism.

This section was accepted by the Commission 7-4 on October 5, 2005.

**B. CONSTITUTIONAL AMENDMENT DEFINING MARRIAGE AS  
BETWEEN ‘ONE MAN AND ONE WOMAN’**

Marriage is universally found in all cultures and is exclusively designated to be a union of male and female. The Commission feels strongly that not only does this universal institution of marriage matter, but that the legislature and ultimately the people should have the final say as to how it should be structured and defined. Unfortunately, activist courts in other states have usurped the authority of the legislature with respect to the definition of marriage. In Vermont in 2000 and again in Massachusetts in 2003, the relevant state Supreme Court declare unconstitutional the definition of marriage as being the union of one man and one woman. Other countries have experienced similar court challenges and judicial results. The most recent example is Canada where the Canadian court held that the ban on same sex marriage was unconstitutional. These repeated legal challenges<sup>39</sup>, especially in light of recent holdings in favor of same sex marriage, suggest that such challenges are likely to continue and will likely occur in New Hampshire as well.<sup>40</sup> Should such a lawsuit be resolved here as it has been in Vermont or Massachusetts, the law that has existed in New Hampshire for 200 years may be declared unconstitutional. The only way to ensure the people of New Hampshire retain the power to which we believe they are entitled in this matter is to pass a constitutional amendment defining marriage in New Hampshire as the union of a man and a woman.

To do so would be consistent with the actions of many other states. In response to the legal challenges discussed previously, thirty-nine states have passed Defense of Marriage Acts (DOMA’s) and nineteen states have added Constitutional amendments defining marriage as “union of one man and one woman”. Forty-four states now have statutory and/or constitutional language protecting traditional marriage. Nonetheless, states are concerned that their laws may not stand up to legal challenge before activist judges, so they are taking further constitutional action to protect marriage. In the wake of the legalization of same-sex marriage in Massachusetts, thirteen states had a constitutional amendment preserving traditional marriage on the ballot during the fall of 2004. All thirteen ballot measures passed by considerable majorities, even in Oregon.<sup>41</sup>

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<sup>39</sup> A review of current court cases pending in other States and review of advocacy groups mission statements show that several legal theories are being used in attempts to impose same sex marriage upon the states: (a) State’s marriage laws are non specific and require interpretation to determine if same sex couples are excluded, (b) The statutory language for the definition of marriage excluding same sex couples is not supported by a “rational basis” and thus violates the State’s constitution, and (c) The State’s laws under Defense of Marriage Act (DOMA) violates the State or Federal Constitution under a variety of clauses.

<sup>40</sup> The legal advocacy of same sex marriage is not just a random occurrence but is a well-financed and politically organized attempt to bypass the legislative process. The most active same sex advocacy groups are (a) The Human Rights Commission (HRC), (b) The Lambda Legal Defense Fund, (c) Gay & Lesbian Advocates & Defenders (GLAD), and (d) The American Civil Liberties Union (ACLU).

<sup>41</sup> See <http://www.heritage.org/Research/Family/Marriage50States.cfm>

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The Commission notes that several states have pending ballot initiatives to define marriage as “a union of one man and one woman” for their state constitutions. Texas voters voted to ban same-sex marriage in November 2005. Alabama lawmakers approved putting an amendment on the ballot in June 2006, and voters will be permitted to vote on this issue next year in South Carolina (November 2006), South Dakota (November 2006) and Tennessee (November 2006).

The Commission took approximately 16 hours of expert testimony and 16 hours of public testimony from April 2005 to September 2005. The Commission found testimony from the following person credible to support a recommendation to support a constitutional amendment to define marriage as “union of one man and one woman” and not allow marriage to include same gender persons.

A. PROFESSOR HESSE – 9/12/05

Testified that New Hampshire cannot deny same sex marriage. Testified that individual rights under NH Constitution in the substantive due process clause are greater than the Federal Constitution. The State also cannot deny same sex marriage under equal protection where sex or gender is a suspect class that requires strict scrutiny. Hence, NH’s Constitution has greater protections than the Federal Constitution regarding same sex marriage. First, Article I, Part 2 includes an equal protection clause that includes “gender” based upon the 1974 amendment that was modeled after the Equal Right Amendment. New Hampshire needs to justify ban on same sex marriage. Even assuming that strict scrutiny does not apply, the State’s ban on same sex marriage fails the rational basis test. Religious arguments in this debate cannot be given any weight for a State purpose. State cannot base legality on procreation.

B. GLEN LAVY – 8/29/05

Glen Lavy at Nashua Public Hearing 8/29/05 and written testimony submitted 9/1/05. Marriage was not created by the State, but existed before government. Marriage is related to procreation and connecting children to their natural parents. No culture recognizes same sex marriage. There are two opposing models of marriage. First is the commitment model of any two persons adopted by the court in Goodridge. This model raises questions of why other definitions of marriage such as polygamy are not possible based upon interests of the individuals. Second is the model based upon procreation and linking children to their biological parents.

C. MAGGIE GALLAGHER - 9/12/05

Maggie Gallagher testimony at hearing 9/12/05; PRESCOTT: What do you mean by the State should take steps for maximum protection of marriage? ANSWER: The State should pass a constitutional amendment to define marriage as only a union of one man and one woman. 19 States have passed such an amendment and also 100 countries have marriage in the national constitution. PRESCOTT: Why do we need a constitutional amendment for marriage? ANSWER: I have been involved in marriage litigation for

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many years. There are powers that want to overturn definition of marriage. This area should be left to the people and not judges.

D. DWIGHT DUNCAN – 9/19/05

Testimony Professor Dwight Duncan. Esq. in response to written questions from Commissioner Fredyma, 9/19/05. “If a state chooses to recognize a relationship which is not modeled on marriage, and does not simply give that relationship the legal incidents of marriage, then the state would be on safer, more constitutionally defensible ground”. “They could indeed treat same-sex relationships not as marriage but as part of a larger category like “reciprocal beneficiary,” which in both the Hawaii and Oregon bills is not limited to same-sex couples but allows siblings and other blood relatives to qualify (although they would obviously not qualify to enter marriage or a marriage-like relationship). To the extent that the legislature models such relationships on marriage, however, then it will be increasingly more difficult to maintain the state’s law that marriage is only between a man and a woman.”

E. CRAIG BENSEN – 9/12/05

Craig Bensen testimony at hearing 9/12/05 and SB 427 Minutes. Recommends that if you have choices as a legislature, make the choices to prevent the Courts from deciding for you.

F. PHILIP TRAVIS – 9/19/05

Rep. Philip Travis, Massachusetts State Representative, testimony at hearing 9/19/05. I believe that a case for a legal challenge of ban on same sex marriage will be coming to NH. Thus, I am here today to give you some insight and information from this debate on same sex marriage. Same sex marriage is a new form of marriage that has never been recognized in our history. If marriage is redefined, society will be redefined. Schools will introduce homosexual themes and sex ed in schools K-12.

G. PROFESSOR NANCY COTT – 9/19/05

Professor Nancy Cott is a Harvard professor specializing in American history, testimony at hearing 9/19/05. Marriage until now has always been between a man and a woman. (1) Marriage is unique with no parallel, (2) Civil institution and not religious, and (3) Has changed vastly over time. Marriage is a bundle of obligations and benefits from the State. No exact parallel with contract where social status is also assigned. Marriage is a private decision but a public institution that is authorized by State authority. Persons pledge to be monogamous and faithful to each other until death do them part (which has roots in Christianity).

## **ANALYSIS AND CONCLUSIONS**

Marriage across essentially all societies and history has been defined as the union of a man and a woman. Though marriage has changed in both the United States and in western society with respect to such issues as rights of women, property rights, divorce and annulment, and race of applicants, marriage is still about the joining of the genders where a state or society has a vested interest that responsible procreation exists for its continuation. Marriage models both natural human sexuality and reproduction that commits to the health, safety, and welfare of both the individual and the community.

First, the sociological and legal arguments that gender is irrelevant to marriage and claims that two men or two women are equal in terms of children rearing to the marriage of the biological father and mother is not supported by the medical research or sociological models. The numbers demonstrate that marriage makes a difference for children. The scholarly consensus is that an intact marriage of a biological mother and a father is demonstrably better than any other family. Moreover, same gender couples never have children without the assistance of heterosexual procreation, artificial medical reproductive technology, or children born out of wedlock to single women. None of these methods will bring children to the homosexual union without forethought and consideration. Hence, there is a reduced need to regulate the homosexual partnership.

Second, the Courts' interpretation that marriage can be genderless is flawed. Once gender is removed from the equation of a marriage, marriage as an institution will be dramatically different. Moreover, it is not hard to image that the number of persons allowed into a marriage could also be legally challenged. The social implications of allowing same sex marriage by means of legal recognition will make it more difficult, if not impossible, for someone to object to homosexuality in the public school curriculum or elsewhere in the public square. If same sex marriage is mandated by the courts under a civil rights analysis, then homosexuals would become a protected class and significant further accommodations would become necessary. The Commission finds such changes would not be in the best interests of society and are not desired by the public.

Third, the Commission finds that comparisons to the denial of same sex marriage to an earlier ban on interracial marriage are not justified. See our earlier discussion of why this is not a civil rights issue.

The Commission further notes that the passage by some states of civil unions or domestic partnerships for same-sex partners has not slowed or stopped legal challenges to require States to accept same sex marriages. Perhaps, the most blatant circumvention of the voice of the people occurred earlier this year in California. A court there ruled that denial of same sex marriage violated the State's constitution, even though California voters had passed a Defense of Marriage Act and a domestic partnership registry with Vermont-style civil unions benefits for same sex couples.

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Legal experts also testified of the risk that a court might mandate gay marriage in New Hampshire. In particular, Professor Hesse, emeritus professor of Franklin Pierce Law Center and constitutional law expert, testified that the current prohibition of gay marriage already was invalid under the state constitution. In order to avoid the uncertainties and confusion and, in our view, poor policy making that results from court-mandated same sex marriage, we recommend that the New Hampshire legislature adopt a constitutional amendment defining marriage in New Hampshire as the union of a man and a woman.

This section was accepted by the Commission 7-4 on October 5, 2005 by roll call vote as follows:

**YEAS** – Brassard, Prescott, Fredyma, Mooney, Barnes, Earnshaw, Soltani.

**NAYS** – MacKay, Butler, Fuller-Clark, Buckley.

**ABSTAINING** - Dupee, Fitch.

**ABSENT** – Odell, Gallus.

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**C. RELIGIOUS FREEDOM BEING AN ESSENTIAL RIGHT IN NEW HAMPSHIRE, NO PERSON SHOULD BE REQUIRED TO PERFORM ANY MARRIAGE WHICH WOULD OTHERWISE OFFEND HIS OR HER CONSCIENCE.**

The Commission observes where same sex partners are granted legal recognition, conflict has arisen with respect to public officials who are required to perform such ceremonies. The states of Vermont and Connecticut provide contrasting approaches to this problem. Both have civil unions but Vermont does not permit public official an opportunity to object to performing such ceremonies for religious reasons or reasons of conscience. In contrast, Connecticut allows an exemption for public officials who have religious or conscientious objections from performing ceremonies for same sex couples.

**ANALYSIS AND CONCLUSIONS**

In New Hampshire, this issue is not addressed currently in the statutory code because no legal recognition has been extended to same sex partners (gays or lesbians) judicially or legislatively. However, the issues of religious freedom are very well defined under the New Hampshire Constitution which gives legal protections for religious freedoms in Part I, Article 4, 5, and 6:

**[Art.] 4. [Rights of Conscience Unalienable.]** Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience. *June 2, 1784*

**[Art.] 5. [Religious Freedom Recognized.]** Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship. *June 2, 1784*

**[Art.] 6. [Morality and Piety.]** As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies, corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established. *June 2, 1784 Amended 1968 to remove obsolete sectarian references.*

The Commission finds that persons who may be involved in the process of performing marriages do not lose their constitutional rights of religious freedom and rights of conscience just because they are a public employee that may be involved in overseeing marriage in the performance as a justice of the peace. The Commission finds that the Vermont model is inappropriate to protect religious freedom for public employees who oversee the solemnizing of civil unions. The Commission recommends that if any legal status is given to same sex couples (gays or lesbians) by the state, then the protections of religious liberty for public employees should be kept consistent with the New Hampshire Constitution for Part I, Article 4, 5, and 6.

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The Commission notes that the right to religious liberty for public employees is not a license to engage in other type of discrimination such as on the basis of race or natural origin that are both protected under Federal law and also New Hampshire statutes RSA 354-A:13.

This section was accepted by the Commission 7-4 on October 24, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Vaillancourt.

**ABSTAINING** – Fitch, Dupee.

**ABSENT** – Odell, Gallus, MacKay.

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**D. THAT THE LEGISLATURE AMEND THE NEW HAMPSHIRE PATIENT'S BILL OF RIGHTS TO CLARIFY THAT A COMPETENT PATIENT'S WISHES RELATIVE TO THE PATIENT'S CHOICE OF VISITATION AND VISITORS ARE RESPECTED BY HEALTH CARE PROVIDERS.**

The Commission finds that there is sufficient evidence to recommend that the current law with respect to visitation of patients in hospitals is inadequate to deal same gender couples. The Commission heard from many at over five public hearings that the policies for same sex couples seeking access to hospitals for visitation of their partners is clearly in need of legislation. The Commission heard from representatives of the Attorney General's Office and the Department of Health and Human Services that any remedy for gay and lesbians to access the hospitals must come from legislature.

The current law under RSA 151:21, XVIII is inadequate because visitation policies cover (a) only terminally ill persons and (b) are not broad enough to cover all the patient's likely choices for visitation:

XVIII. The patient shall be entitled to have the patient's parents, if a minor, or spouse, or next of kin, or a personal representative, if an adult, visit the facility, without restriction, if the patient is considered terminally ill by the physician responsible for the patient's care.

The Commission recommends that this section be expanded to: (a) allow a patient to designate their visitors whether or not such patient is terminal; and (b) allow a patient or representative of the patient who is denied visitation to be able to file a complaint against an offending facility with a state agency that has oversight of these regulations.

**ANALYSIS AND CONCLUSIONS**

1. Commissioner Fitch submitted a research memo dated 10/24/05 regarding current New Hampshire law supporting the conclusion that the current law is inadequate to deal with hospitals, same sex couples, and enforcement/remedy. First, Commissioner Fitch addressed RSA 354-B (Civil Rights Act) and noted the scope of enforcement only deals with actual or threatened physical force or violence. Hence, denial of hospital visitation is not covered under the Act.

2. Commissioner Fitch discussed RSA 354-A regarding the State Commission for Human Rights that protects against discrimination in employment, public accommodation, and housing. Commissioner Fitch noted that this statute would not apply.

3. Commissioner Fitch discussed the current law for the 'Patient Bill of Rights' in RSA 151:19 and RSA 151:21. Commissioner Fitch noted that current law permits a terminal patient, who is able to communicate his or her preferences, to designate and have visitation from a personal representative. Generally, enforcement of this privilege is through a civil action brought in Superior Court. Thus, cases where a person is not

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terminal is not covered by the law and hospital visitation guidelines are not consistent from hospital to hospital.

4. Commissioner Fitch noted that in the absence of a durable power of attorney (defined in RSA 137-J) for health care assigning the same sex partner agent status or designation as a patient's representative, we find no mechanism in current law that would give such person the status of being a spouse or family member that would require a hospital to extend visitation.

5. Commissioner Dupree submitted information to the Commission in a memo dated 10/25/05 regarding the jurisdiction and oversight of the New Hampshire's Department of Health and Human Services for New Hampshire hospitals. Commissioner Dupree stated that DHHS surveys NH Medicaid/Medicare providers, on behalf of the federal Centers for Medicaid and Medicare Services (CMS), and certifies whether those facilities are in compliance with the federal requirements. A general exemption exists under federal law for hospitals which are accredited by entities such as the Joint Commission for the Accreditation of Health Care Organizations. Thirteen out of 26 New Hampshire hospitals have elected to participate in accreditation programs offered by third parties as opposed to participating in the state certification process. Accredited hospitals are still subject to complaint investigations conducted under state and federal regulations.

6. Commissioner Dupree stated there is nothing in federal law or CMS regulation that specifically provides for same sex partners. Therefore, state law would be the controlling law. (But see Atty. Fitch's review dated 10/24/05 of the status of NH laws as they relate to visiting and medical decision making by same sex partners.) In the absence of applicable state or federal law, the hospital's own policy and procedures would govern. Stated another way, if a hospital has policy and procedures that describe how the hospital will treat same sex partners, it must follow its policy and procedures to remain in compliance with federal certification requirements.

7. Commissioner MacKay stated he attempted to survey New Hampshire hospitals regarding visitation policies and found that New Hampshire hospitals do not have standardized processes or consistent policies, but that each hospital generally had its own policy. The Commission, therefore, recommends that the Legislature address correcting these flaws in RSA 151:21 regarding the 'Patient Bill of Rights' to allow patients in hospitals to designate persons allowed for visitation and implement a process for persons who report they have been denied these rights.

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This section was accepted by the Commission 10-2 on October 31, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Fuller-Clark, Odell, MacKay, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

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**E. THAT THE LEGISLATURE CLARIFY THAT SAME SEX COUPLES THAT HAVE LEGAL RECOGNITION IN THEIR HOME STATE FOR PARENTAL RIGHTS BE RECOGNIZED AS JOINT GUARDIANS UNDER NH'S LAW FOR JOINT GUARDIAN RIGHTS AND OUT OF STATE RECIPROCALLY AS DEFINED IN RSA 463:10, RSA 463:30, AND RSA 462:32-a.**

New Hampshire law not only bans same sex marriage, but pursuant to SB 427 refuses to recognize the legal rights of the adults of the same gender to be considered “spouses” under the law. NH laws, however, do not deny rights to gays or lesbians as a class; in fact, in many cases New Hampshire grants statutory protections for sexual orientation (RSA 354-A:8) and expressly permits adoption or guardianship by gays or lesbians under RSA 170-B:4. ‘Who May Adopt’ and RSA 463:10. ‘Who May be Appointed Guardian’.

The Commission notes that homosexual couples who are married elsewhere may travel to or through New Hampshire giving rise to a variety of legal scenarios for the non-domiciled legal entity regarding New Hampshire law.

**ANALYSIS AND CONCLUSIONS**

1. The Commission notes New Hampshire has been dealing with non-nuclear families with dependent children for generations. Furthermore, interstate and foreign transportation into New Hampshire of non-nuclear family units, including same sex couples with dependent children are covered under current laws that are relevant to the existing debate. The laws for adoption described in RSA 170-B:4, though favoring a married couple, do not preclude individuals in a same sex relationship from adopting. Under RSA-B:4, however, such an application by a gay or lesbian prospective parent would have to be filed as an individual rather than as a couple with his or her same sex partner.

2. Similarly, New Hampshire law on guardianship in RSA 463 provides both procedural remedies and substantive legal rights for a non-biological adult household member to obtain parental rights and custodial control of minor children. Thus, the following sections on adoptions and guardianship are relevant to issues dealing with same sex couples that have legal recognition in a foreign jurisdiction regarding their parental rights:

**• RSA 170-B:29 Recognition of Foreign Decree Affecting Adoption. –**

A decree of court terminating the relationship of parent and child or establishing the relation by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state and the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree was issued by a court of this state.

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- **RSA 463:10. Who May be Appointed Guardian:** ... III. Co-guardians may be appointed when in the best interest of the minor. Co-guardians shall share jointly and equally the authority granted, except as otherwise ordered by the court....

- **RSA 463:30 Foreign Guardianships of the Estate.** – Any person who has been appointed guardian of the estate of a minor by a court of competent jurisdiction in any other state shall, upon petition and filing of a certified copy of that appointment with the court, be appointed guardian of the estate of the minor situated in this state without further notice or hearing...

- **463:32-b Transfer of Guardianships From Foreign Jurisdictions.** – I. Any person who has been appointed guardian of the person or estate or both, by a foreign court of competent jurisdiction, for a minor who has become a resident of this state, or who intends to move to this state, shall be accorded the powers of guardianship as reflected in the order appointing the guardian, with full faith and credit, for a period of time not exceeding 120 days following the date of the ward's residence in this state. If a petition for transfer of the guardianship is filed within 120 days of the date of the minor's residence in this state, such guardianship shall continue until an order is issued on the petition for transfer. II. The transfer of an existing guardianship that has been established by a foreign court of competent jurisdiction shall not require this state's court to make a determination of the appropriateness of the guardian's appointment or assigned powers and responsibilities unless the court is specifically requested to do so....

3. The Commission is also aware that the gay advocacy group GLAD recommends the use New Hampshire joint guardian statutes as legal remedies for same sex couples that want joint parental rights in the absence of a second parent adoption process being available.

Co-guardianship: This process allows a parent to name the other non-legal parent as a co-guardian so that he or she may secure medical attention and health insurance for the child and in all other ways act with the legal authority of a parent. See NH RSA 463:10 (allowing appointment of appropriate persons, including “co-guardians may be appointed when in the best interests of the minor”), 12 (rights of guardian). The best interest of the child standard controls appointments of guardians. NH RSA 463:8. The guardian must annually file a report on the minor’s welfare. NH RSA 463:12. This status is not permanent, and any person, including the legal parent, may petition to have a guardian removed. NH RSA 463:14-16.

4. The Commission received expert testimony from attorney Susan Hassan, Esq. of German, Stacy, Schulthess & Steere, PA, testimony at Expert Public Hearing 9/19/05

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FREDYMA: Does New Hampshire recognize unions from Mass and Vermont where same sex married couples are automatically co-guardians of children where NH law codifies joint guardianship and out of state reciprocal recognition?

ANSWER: Yes. As long as the child is recognized to be legal tied to both persons in the domiciled State New Hampshire would recognize the same sex married couples with kids as co-guardians for New Hampshire law.

5. In summary, the Commission recommends that the legislature clarify that same sex couples that have legal recognition in their home state for parental rights to be recognized as joint guardians under New Hampshire's law for joint guardianship as defined in RSA 463:10; RSA 463:30; and RSA 463:32-a.

This section was accepted by the Commission 6-5 on November 7, 2005 by roll call vote as follows:

**YEAS** - Buckley, Earnshaw, Fredyma, Fuller-Clark, Mooney, Soltani.

**NAYS** - Barnes, Brassard, Butler, MacKay, Prescott.

**ABSTAINING** – Fitch, Pockell.

**ABSENT** – Odell, Gallus

**VII. NON-MOVING PARTY RESPONSE TO MOTIONS.**

- A. The State of New Hampshire has a proud history of support of its gay and lesbian citizens. This Commission recommends that the Legislature move forward to provide the full rights and responsibilities of civil marriage for gay and lesbian couples.**

**MOTION FAILED 2-10 on 10/24/05**

**ANALYSIS AND CONCLUSIONS**

The Commission recognizes New Hampshire's proud history of support of its gay and lesbian citizens and seeks to build upon it. In light of our earlier discussions of the purpose and contributions of man/woman marriage, we believe that redefining marriage to make it genderless would not be detrimental to the institution of marriage, children and our society. We also believe that there is little evidence to suggest there would be much if any benefit for gays and lesbians. First, so few gays and lesbians take up the mantle of marriage when given the opportunity that there is little evidence that redefining the institution will have much of a positive impact upon them. Second, although marriage between a man and a woman raising their biological children has been shown to provide significant benefits to children and society, there is little evidence that similar benefits will obtain for gay and lesbian couples if they are permitted to have the formality of marriage.

We also note that legal recognition of same sex marriage without also extending similar rights to other classes of persons such as siblings, who may have Constitutional rights as set forth in U.S. Supreme Court case of Moore v. E. Cleveland 431 U.S. 494 (1977), may raise complex constitutional issues.

The Commission finds that redefining marriage to be genderless would not be in the best interests of society nor would it be consistent with the other findings and recommendations set out in this report.

This section was denied by the Commission 2-10 on October 24, 2005 by roll call vote as follows:

**YEAS** – Butler, Fuller-Clark.

**NAYS** – Barnes, Brassard, Buckley, Earnshaw, Fredyma, Gallus, MacKay, Mooney, Prescott, Soltani.

**ABSTAINING** – Fitch, Dupee.

**ABSENT** – Odell.

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- B. The Commission recommends that the Legislature welcome and recognize the legal status of nonresident gay and lesbian couples from outside of our borders. This should be done regardless of what the legislature determines relative to the legal relationship status of its own gay and lesbian couples.  
MOTION FAILED 5-7 on 10/24/05**

**ANALYSIS AND CONCLUSIONS**

To avoid the inconsistent legal treatment of same sex marriages or unions from foreign jurisdictions but and residents gay couples was exactly the reason SB 427 was passed. We believe that extending legal recognition to only out-of-state marriages would lead state courts to find the inconsistent treatment of in- and out-of-state same sex marriages unconstitutional.

In addition, this proposal suffers the same flaws of granting same sex marriage rights to all New Hampshire residents discussed above in that it involves complex constitutional issues of granting rights of marriage to a new class of persons but does not address why other classes of persons, such as siblings are not entitled to the same rights or privileges.

This section was denied by the Commission 5-7 on October 24, 2005 by roll call vote as follows:

**YEAS** – Buckley, Butler, Fuller-Clark, Gallus, MacKay.

**NAYS** – Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**ABSTAINING** – Fitch, Dupee.

**ABSENT** – Odell.

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- C. That section 1204 (a)(b)(c)(d)(f) of the Vermont Civil Union Statute be put forth as a majority recommendation.  
MOTION FAILED 3-8 on 11/7/05**

**ANALYSIS AND CONCLUSIONS**

Civil unions are the same thing as ‘same sex marriage’ without the name and suffer the same flaws. Moreover, the Commission feels that separate but unequal is not acceptable. Finally, there is legal precedent that granting civil unions will make legal challenges to the current definition of marriage easier. In addition, in Goodridge (2003), the Massachusetts Supreme Judicial Court was asked by the State if ‘civil unions’ would be constitutional and the Court ruled ‘No’.

This section was denied by the Commission 3-8 on November 7, 2005 by roll call vote as follows:

**YEAS** – Buckley, Fuller-Clark, MacKay.

**NAYS** – Barnes, Brassard, Butler, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**ABSTAINING** – Fitch, Pockell.

**ABSENT** – Odell, Gallus.

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- D. That second parent adoption rights of same-sex couples become law in  
New Hampshire.  
MOTION FAILED 4-7 ON 11/07/05**

**ANALYSIS AND CONCLUSIONS**

The Commission notes that several issues exist regarding two-parent adoption where the applicants are of the same gender. The Commission notes two likely scenarios for children involved in adoption and guardianship. The first is a case where one partner has a child from a previous heterosexual relationship or has conceived a child through artificial reproductive technology. The second is where a childless same sex partner and/or couple is petitioning or want to co-petition for adoption or guardianship of a child that is not biologically related to either applicant. Thus, here the State is making a judgment in the best interests of the child by selecting a possible home.

The Commission is unwilling to support second parent adoption rights for same-sex couples for the same reasons that the Commission opposes enacting same sex marriage. First, the state of the research on parenting by same sex couples is uncertain at best. Second and perhaps more importantly, permitting second parent adoption weakens the state's basis for distinguishing between same sex couples and opposite sex couples in terms of marriage policy. Any grant of adoption rights for same sex couples should be accompanied by a clear statutory provision that gives priority to married heterosexual couples.

This section was denied by the Commission 4-7 on November 7, 2005 by roll call vote as follows:

**YEAS** – Buckley, Butler, Fuller-Clark, MacKay.

**NAYS** – Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**ABSTAINING** – Fitch, Pockell.

**ABSENT** – Odell, Gallus.

**VIII. MOONEY, EARNSHAW, FREDYMA, BRASSARD MINORITY REPORT.**

- A. Hawaii and Washington, DC style Reciprocal Benefits Act (Domestic Partnership Registries) extending economic benefits to all different family structures including same-sex couples; unmarried heterosexual couples and blood relatives should be further explored and considered in New Hampshire.  
DENIED BY MAJORITY BY VOTE 5-6 ON 10/24/05**

The Commission finds that marriage deserves its special status in law and society in the State of New Hampshire, because marriage performs a unique and irreplaceable social function: it encourages men and women to create and rear their children together. Marriage matters for many reasons but the most important one is this: marriage aims at making the next generation in the only context in which children can be known and loved by their own biological mother and father.

However, the Commission concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals of the same gender are both prevented from legally marrying. A minority of the Commission believes that certain limited rights and benefits presently available only to married couples should be made available to these additional couples without calling such a relationship a marriage. This third alternative (after gay marriage and civil unions) is known as a Reciprocal Benefits Registry or Reciprocal Benefits Agreement. The former would create a registry like marriage or civil unions, but it would be open not only to gays and lesbians, it would also be open to extended family members who cannot marry. The later would rely solely on a new form of contractual arrangement like a will that would be open to gays, lesbians and family members who cannot marry. Thus, in the later case, there would be no new state-recognized relationship. In both cases, the specific rights and benefits extended to the new relationship could be expanded or restricted as the legislature deemed appropriate. We propose that the Reciprocal Benefits Agreement approach be adopted for any rights or benefits extended to same sex couples in New Hampshire so that no new state recognized relationship is created. This approach has the dual benefit of minimizing any negative impact upon the institution of marriage and any confusion with it while at the same time avoiding administrative costs that would be involved in the first approach requiring a state registry of some sort.

Furthermore, we recommend that the legislature only include those items as benefits or rights that would have limited or no impact on the state budget and which would not create a burden for private employers.

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For purposes of reference, we refer to the Hawaii model of “Reciprocal Benefits”<sup>42</sup> which provides in part as follows:

Among the benefits extended to reciprocal beneficiaries which are substantially equivalent to those extended to spouses are: (1) Survivorship rights including inheritance, workers compensation survivorship benefits, state employees retirement beneficiary benefits; (2) Health related benefits including hospital visitation, private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave; (3) Benefits and obligations relating to jointly held property: tenancy in the entirety, disaster relief loans, and public lands leases; (4) Legal standing relating to wrongful death, victims rights, and domestic violence family status; and (5) Miscellaneous benefits such as University of Hawaii facilities use, anatomical gifts, and government vehicle emergency use.

**FACTS, TESTIMONY, AND RESEARCH:**

**A. What is the state’s interest in marriage?**

1. The Commission notes that numerous decisions of the states and federal government post ‘Lawrence v. Texas’, 539 U.S. 558 (2003)<sup>43</sup>, have affirmed that marriage defined as the union of a man and woman is constitutional and have affirmed the Federal Defense of Marriage Act of 1996 (DOMA)<sup>44</sup>. Proponents and prior court decisions emphasize procreation and responsible child rearing for society by linking children to their biological parents as the optimum arrangement. The standard of review under the rational basis test is, “Does the statute further a legitimate government interest and is it rationally related to accomplish its goal?”

2. What is State’s interest in promotion or endorsement of homosexuality? Is its continuance and promotion so essential for society to be given heightened scrutiny as equal to marriage? The general answer is that it’s a sociological arrangement and not a biological one. Same sex marriage is not linked to procreation or producing children. If same sex couples do produce children, they do it is by state regulated industries for reproductive technology. In addition, they are usually not biologically related to the non-primary parent in almost all situations or other children in the household.

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<sup>42</sup> <http://www.hawaiilawyer.com/legislat/hb118cv.txt>, H.B. No. 118, "A BILL FOR AN ACT RELATING TO UNMARRIED COUPLES. The Hawaii model is only provided by way of reference. The minority notes that the Hawaii model goes further than it proposes because the Hawaii model would create a state registry and thus a state-recognized relationship which the minority considers inadvisable.

<sup>43</sup> <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=02-102>

<sup>44</sup> Commissioner Fitch Report 6/27/05 regarding cases in Arizona, New Jersey, Washington, and California. (1) Same Sex Marriage - Federal DOMA Cases of In Re Kandu, 315 B.R. 123 (2004) and Smelt v. Orange County (2005), (2) Review of Other State Court Decisions on Same Sex Marriage - Standhardt v. Superior Court of The State of Arizona (2003) and Lewis v. Harris, (2005).

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3. Proponents argue that marriage for same sex couples and status of marriage brings (1) stability to families and communities, (2) promotes health and welfare of children that may be present, (3) encourages stable homes that result in increased productivity, (4) lessens burdens on social services, (5) reduces crime, and (6) reduces poverty to society. There is substantial doubt as to whether any of these benefits will accrue to same sex couples if they are permitted to marry. And the question remains if these qualities result by allowing same sex couples to marry, then why not extend this same package of benefits to other categories of families? The proponents of same sex marriage hope to avoid this question by suggesting the question should be addressed only after rights have been extended to same sex couples.

4. Can the state grant the special status of marriage containing specific rights and benefits as matter of public policy and exclude others such as blood relatives or same sex persons who are sexually intimate? The U.S. Supreme court has ruled that in the case of blood relative that they are classes of persons that are recognized as suspect class under the 14<sup>th</sup> Amendment for substantive due process clause protections. See: Moore v. E. Cleveland, 431 U.S. 494 (1977) under Federal Constitution. The same recognition for same sex persons who are sexually intimate has not been recognized as an essential right. Hence, extending rights to married couples to same sex persons who are sexually intimate but excluding blood relatives raises serious constitutional questions.<sup>45</sup>

5. Should a State offer a formal recognition of the relationship of two persons of the same gender that are sexually intimate for the purposes of accessing certain benefits that are reserved for married persons or persons related by blood? The 399 NH statutes that are referenced by GLAD include 69 statutes that involve rights, obligations, and privileges that include blood and kinship that are extended to spouses and vice versa. There are also about the 72 statutes that impose obligations and restriction based upon a spouse and how many of these should be applied, if any.

6. If Yes to #5, then what type of relationship should be recognized?

7. If Yes to #6, then what groups can be excluded and under what constitutional analysis?

8. If Yes to #7, then what rights should be given to same sex couples if a formal recognition is made by the State and why?

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<sup>45</sup> [http://straylight.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0431\\_0494\\_ZO.html](http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0431_0494_ZO.html) Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.<sup>[m2]</sup> It is through the family that we inculcate and [p504] pass down many of our most cherished values, moral and cultural. Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree [p506] of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. By the same token, the Constitution prevents East Cleveland from standardizing its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns.

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9. In addition, the Commission received evidence that New Hampshire's Constitution has greater protection for equal protection and due process clauses than the federal constitution by same sex advocates<sup>46</sup>.

B. Survey of U.S. Jurisdictions.

10. Eight other states and/or U.S. jurisdictions have laws for same sex couples. Hawaii's was in response to a legal challenge in 1996. Voters amended their state constitution to ban same sex marriage but also adopted a domestic partnership registry for (a) same sex couples, (b) unmarried heterosexual couples, and (c) blood relatives. Vermont's was in response to a legal challenge in 1999 and the concept of civil unions was created. Massachusetts' was also a result of a Supreme Court decision that mandated same gender marriages. Of these eight states and/or U.S. jurisdictions, ½ of these jurisdictions recognized other family units for benefits incident to marriage, including property rights and public benefits<sup>47</sup>.

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<sup>46</sup> SB 427 Testimony Expert Public Hearing 9/12/05, Professor Dick Hesse, Esq. Claims that State cannot deny same sex marriage. Claims that individual rights under NH Constitution in the substantive due process clause are greater than the Federal Constitution. The State also cannot deny SSM under equal protection where sex or gender is a suspect class that requires strict scrutiny for analysis. Hence, NH's Constitution has greater protections than the Federal Constitution regarding SSM. First, Article I, Part II includes an equal protection clause that includes "gender" based upon the 1974 amendment that modeled the Equal Right Amendment. The State needs to justify ban on SSM. Assuming that even if strict scrutiny does not apply, the State's ban on same sex marriage fails the rational basis test.

<sup>47</sup> The Human Rights Campaign Foundation, [www.hrc.org](http://www.hrc.org).

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**Survey of U.S. Jurisdictions**

<b>STATE OR MUNICIPALITY</b>	<b>DOMESTIC PARTNER REGISTRY</b>	<b>RIGHTS AS MARRIED COUPLE</b>	<b>RECOGNIZES OTHER STATE REGISTRIES</b>	<b>RECOGNIZES OTHER FAMILY UNITS (DP)</b>
Washington, DC	X	No	?	Yes, Both Blood Relatives and Unmarried Heterosexual Couples
Massachusetts	X	Yes, Marriage License	?	No
California	X	Yes	?	Yes, Unmarried Heterosexual Couples Age 62
Connecticut	X	Yes, Civil Union as of 10/1/05	Yes	No
Hawaii	X	Some	?	Yes, Both Blood Relatives and Unmarried Heterosexual Couples
Maine	X	Some	?	Yes, Unmarried Heterosexual Couples
Vermont	X	Yes, Civil Union	?	Yes, limited Blood Relatives (Reciprocal)
New Jersey	X	Some	?	Yes, Unmarried Heterosexual Couples Age 62

**C. Survey of Foreign Jurisdictions.**

11. Fourteen other non-U.S. jurisdictions have laws for same sex couples. Of these fourteen, at least ½ of these jurisdictions recognized other family units for benefits incident to marriage, including property rights and public benefits<sup>48</sup>.

<sup>48</sup> International Gay and Lesbian Association, [www.igla.org](http://www.igla.org)

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**Survey of Foreign Jurisdictions**

<b>COUNTRY</b>	<b>DOMESTIC PARTNER REGISTRY</b>	<b>RIGHTS AS MARRIED COUPLE</b>	<b>RECOGNIZES OTHER COUNTRY REGISTRIES</b>	<b>RECOGNIZES OTHER FAMILY UNITS (DP)</b>
Canada, Province of Alberta	X	Yes, Marriage License	Yes	Yes, Both Blood Relatives and Unmarried Heterosexual Couples
England	X	No		
France	X	Yes		Yes, Unmarried Heterosexual Couples
Spain	Yes	Yes – Marriage License		
Portugal		Yes		Yes, Unmarried Heterosexual Couples (common law)
Germany	X	Yes		Yes, Relatives of Partners are now recognized
Italy		Yes		Yes, Unmarried Heterosexual Couples (common law)
Denmark	X	Yes		
Norway	X	Yes		
Sweden	X	Yes	Yes	Yes, Unmarried Heterosexual Couples
Iceland	X	Yes	Yes	
Finland	X	Yes		
The Netherlands	X	Yes, Marriage License	Yes	Yes, Unmarried Heterosexual Couples
Belgium	X	Yes, Marriage License	Yes	Yes, Both Blood Relatives and Unmarried Heterosexual Couples

## **ANALYSIS AND CONCLUSIONS**

### **D. Commission Recommendation.**

12. The Commission finds that marriage models both natural human sexuality and reproduction and enhances the health, safety, and welfare of both the individual and the community. Marriage across essentially all societies and modern history has been always defined as the union of man and woman. There are, however, classes of persons that cannot marry, such adults of the same gender and persons related by blood that are excluded from the social and legal benefits and obligations of marriage.

13. The Commission received testimony from expert witnesses (1) Professor Hesse that NH's Constitution of areas of equal protection and due process are more protective than the federal constitution and (2) Professor Dwight Duncan stated that NH can not extend rights to same sex couple but exclude extended families under Constitutional law<sup>49</sup>.

14. Furthermore, the Commission recognizes that when examining other jurisdictions for extending rights to same sex unions, other jurisdictions included other classes of persons for the same benefits. Hence, the Commission recommends that Reciprocal Benefits Arrangement (not including the establishment of a new state-recognized relationship) be made available to certain classes of persons that cannot marry, including (a) Adults of the same gender and (b) Persons related by blood that are barred from marriage.

15. Thus, the Commission finds that Reciprocal Benefits would extend rights to (a) Adults of the same gender and (b) Persons related by blood that are barred from marriage under NH RSA 457:1 & 457:2 with many of the same rights as married couples with the following exceptions:

- Reciprocal Benefits are not marriages where the current adoptions laws for spouses to adopt is not included for a reciprocal beneficiary where existing laws for joint guardianship would be followed.
- Reciprocal Benefits are not marriages where upon dissolution of a Reciprocal Benefit registration, alimony or support is available Persons in Reciprocal relations may use pre-nuptials for possible distribution of assets for dissolution but spousal support is not deemed a right or automatically assumed under the Act

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<sup>49</sup> SB 427 Testimony 9/19/05, Professor Dwight Duncan. Esq. "Answers to written questions from Commissioner Fredyma, 9/19/05 With respect to same-sex couples, the question arise as to why the line should be drawn there, in allowing for civil unions/domestic partner/reciprocal benefits? Put differently, why would adult siblings caring for each other (and, indeed, loving each other, but who would not have a sexual relationship) be disqualified from such arrangements? What about a woman caring for her elderly aunt? Any time the state draws a line that cuts off family members, as in *Moore*, it invites strict scrutiny of its reasons and justifications. What would be the compelling justification (as would be required under *Moore*) for covering same-sex lovers while not covering siblings?"

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- Reciprocal Benefits for property rights are deemed a contract right and not a right by marriage or a right as a spouse. The term spouse will only be used in conjunction with a state-recognized marriage.
- Reciprocal Benefits may or may not be recognized outside of New Hampshire. Reciprocal Benefits are not exempt from federal taxation and may be federally pre-empted.

16. The Commission finds that in reviewing the statutes relating to marriage as identified by same sex marriage advocates GLAD and the NH Freedom to Marry Coalition, approximately 250 laws related to benefits and obligations of marriage or kinship. In analyzing these statutes, there are categories or subgroups within the approximately 250 laws that can be identified and prioritized for recommendation to the legislature:

- Rights based upon kinship or to be recognized as an immediate family member
- Rights that are equity in nature
- Rights that involve personal property
- Rights that are actually restrictions and obligations
- Rights that the State will enforce for public good and safety
- Rights that effect State revenues, administrative services, or policies on third parties

17. Many of these statutes are cross linked with other rights, either private property, equity or injunctive rights, and some tied to state benefits or powers of enforcement. The Commission recommends that the above list be started with areas first that do not involve state involvement but instead deal with recognitions, equity or injunctive rights, and then personal property rights. The issues of health care coverage, pensions, and enforcement of civil rights or restrictions individually cover a wide scope and the legislature must address those issues carefully due to the potential financial impact on state revenue and private employers. Finally, areas that are considered restrictions and obligations might be the last category of laws to be expanded.

1. Rights or Restrictions Based Upon Kinship or To Be Recognized As an Immediate Family Member

See Commission Record<sup>50</sup>, Table #1 - Areas to be covered, 68 statutes, some examples:

- #10 - Exclusion of gifts from relatives to State Legislators for reporting
- #26 - Restriction on property of elderly for tax credit if exchange involves a relative
- #43 - Retirement benefits to either surviving spouse or dependent children from State

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<sup>50</sup> Excel Spreadsheet of GLAD 399 NH Statutes, List of Property Types by Commission Fredyma 11/29/05.

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- #57 - Admission for involuntary commitment and names of relatives to be disclosed
- #65 - Exemption for transfer of health care facility and its licensing
- #67 - Right to know of medical records regard discharge of persons committed
- #85 - Exemption on lien on home for public assistance if spouse or relative has ownership
- #87 - Restriction on relative defined regarding public assistance
- #88 - Restriction on relative defined regarding public assistance for adoption or foster care
- #101 - Definition of immediate family regarding public safety and delinquent children
- #111-112 - Definition of related family regarding child day care and placing agencies
- #113 - Right for notice of person either incapacitated or under protective order to next of kin
- #114 - Definition of related family member regarding domestic violence protection

## 2. Rights That Are Equity in Nature

See Commission Record<sup>51</sup>, Table #2 - Areas to be covered, 22 statutes, some examples

- #63 - Right to be on advisory counsel for spinal injuries
- #66 - Right to privacy for visits and share room with spouse if both parties in same facility
- #117 - Restriction on communication from sexual assault counselor and a minor involving spouse
- #118 - Privilege of allowing child to attend schools if one person in marriage has another domicile that the child.
- #132-133 - License plates to spouse if member of certain States offices or positions
- #134 - Protection for residency if spouse is in military
- #316 - Requirement for disclosure of parental marriage, domestic violence
- #317 - Right of guardian to consent to marriage or adoption of minor
- #387 - Exemption for statute for married persons for sexual assault if victim is mentally defective
- #398-399 – Right for absentee ballot for spouse for persons in military service

## 3. Rights That Involve Personal Property Rights

See Commission Record<sup>52</sup>, Table #3 - Areas to be covered, 44 statutes, some examples

- #16 - Right to support from persons that are incarcerated by the State
- #55 - Protection for expenses to spouse that are capped after 10 years for an institutionalized party
- #79 - Protection against lien on persons receiving assistance that is extended to surviving spouse and children
- #125 - Extending automatic motor vehicle indemnification statute to spouses
- #127 - Extending automatic motor vehicle ownership to spouse of married person

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<sup>51</sup> Excel Spreadsheet of GLAD 399 NH Statutes, List of Property Types by Commission Fredyma 11/29/05.

<sup>52</sup> Excel Spreadsheet of GLAD 399 NH Statutes, List of Property Types by Commission Fredyma 11/29/05.

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- #128 - Waive filing fee for first title of transfer vehicle ownership to spouse of married person.
- #129 - Extending residency for former NH resident in military and spouse to register motor vehicle.
- #144 - Extending definition of “dependent” to including surviving widow and surviving common-law husband/wife.

**ANALYSIS AND CONCLUSIONS**

19. In summary, the Commission concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the Commission believes that certain limited rights and benefits presently available only to married couples should be made available to other couples. Finally, due to legal challenges on the definition of marriage<sup>53</sup> and the belief that any restructuring of marriage belongs to the legislature and the people, not the Courts, we recommend that the Reciprocal Benefit Agreement mechanism be considered.

This section was denied by the Commission 5-6 on October 24, 2005 by roll call vote as follows:

**YEAS** – Brassard, Earnshaw, Fredyma, Mooney, Soltani.

**NAYS** – Barnes, Buckley, Butler, Fuller-Clark, Prescott, Vaillancourt

**ABSTAINING** – Fitch, Dupee.

**ABSENT** – Odell, Gallus, MacKay

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<sup>53</sup> SB 427 Testimony from Professor Dwight Duncan. Esq. Answers to written questions from Commissioner Fredyma, 9/19/05. “Thus, if a state chooses to recognize a relationship which is not modeled on marriage, and does not simply give that relationship the legal incidents of marriage, then the state would be on safer, more constitutionally defensible ground. They could indeed treat same-sex relationships not as marriage but as part of a larger category like “reciprocal beneficiary,” which in both the Hawaii and Oregon bills is not limited to same-sex couples but allows siblings and other blood relatives to qualify (although they would obviously not qualify to enter marriage or a marriage-like relationship.) To the extent that the legislature models such relationships on marriage, however, then it will be increasingly more difficult to maintain the state’s law that marriage is only between a man and a woman.”

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- B. The definition of “adultery” in RSA 645:3 should be amended to read as follows: A person is guilty of a class B misdemeanor if, being a married person, he engages in sexual [~~intercourse~~] activity with another not his spouse or, being unmarried, engages in sexual [~~intercourse~~] activity with another known by him to be married. In this section, “sexual activity” shall be as defined in RSA 649-A:2, III. And Amend RSA 458:7, II to read as follows: II. Adultery of either party, as defined in RSA 645:3. DENIED BY MAJORITY BY VOTE 5-7 ON 10/31/05**
- C. The definition of “incest” in RSA 639:2, I should be changed to replace the terms “sexual intercourse” with sexual activity where “sexual activity” shall be as defined In RSA 649-A:2, III. RSA 639:2.1 amended to read as follows: A person is guilty of a class B felony if he marries or has sexual [~~intercourse~~] activity, or lives together with, under the representation of being married, a person whom he knows to be his ancestor, descendant, brother or sister, of the whole or half blood, or an uncle, aunt, nephew or niece; provided, however, that no person under the age of 18 shall be liable under this section if the other party is at least 3 years older at the time of the act. The relationships referred to herein include blood relationships without regard to legitimacy, stepchildren, and relationships of parent and child by adoption. DENIED BY MAJORITY BY VOTE 5-7 ON 10/31/05**

### ANALYSIS AND CONCLUSIONS

The Commission notes that under the duties of studying legal extension to same gender couples, many of New Hampshire’s statutes for marriage are written in heterosexual terms and also imply heterosexual sexual contact and conduct. The Commission notes that several of the statutes in GLAD’s list (See #391 for Incest, RSA 639:2 & # 393 for Adultery RSA 645:3) are do not make much sense and would need to be rewritten in the event of judicially mandated or legislatively enacted same sex marriage or civil unions.

In summary, a review of both New Hampshire’s laws and the laws of certain other states (Massachusetts, Vermont, New Jersey, Connecticut, and California) with respect to marriage, divorce, legal separation, and annulment clearly show that serious legislative review of **adultery** and **incest** laws would be needed if New Hampshire were to recognize same sex unions, civil unions, and/or domestic partners that mirror current marriage statutes.

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalent  
Thereof, Whether Referred to as Civil Unions, Domestic Partnerships,  
or Otherwise SB 427, Chapter 100:2, Laws of 2004**

This section was denied by the Commission 5-7 on October 31, 2005 by roll call vote as follows:

**YEAS** – Brassard, Earnshaw, Fredyma, Mooney, Soltani.

**NAYS** – Barnes, Buckley, Butler, Fuller-Clark, Odell, MacKay, Prescott

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
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- D. Tighten the statutes on parental notification and consent on sex education in public schools.  
DENIED BY MAJORITY BY VOTE 5-7 ON 10/31/05**

**ANALYSIS AND CONCLUSIONS**

One of the greatest impacts of adopting same sex marriage in other jurisdictions is the increased homosexual content in the curriculum of the public schools. This is not limited to the sex education curriculum but includes broad requests for more gay friendly modules and role models. See our earlier discussion of the cascade of effects resulting from gay marriage. We believe the legislature should enact expanded and explicit parental notification and consent requirements so that parents will be aware of what is being taught to their children and have an opportunity to opt out where such teaching conflicts their own moral views.

This section was denied by the Commission 5-7 on October 31, 2005 by roll call vote as follows:

**YEAS** – Brassard, Earnshaw, Fredyma, Mooney, Soltani.

**NAYS** – Barnes, Buckley, Butler, Fuller-Clark, Odell, MacKay, Prescott

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
Thereof, Whether Referred to as Civil Unions, Domestic Partnerships,  
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- E. Include “religious creed” in RSA 354-A:1, RSA 354-A:8 , RSA 354-A:16, and RSA 354-A:17 as similarly found in RSA 354-A:7.  
ENIED BY MAJORITY BY VOTE 5-7 ON 10/31/05**

**ANALYSIS AND CONCLUSIONS**

A minority of the Commission recommends that the legislature include “religious creed” in RSA 354-A:1, RSA 354-A:8 , RSA 354-A:16, and RSA 354-A:17 as similarly found in RSA 354-A:7 if legal recognition is given to same gender couples identified as gays and lesbians. We note that protection for sexual orientation currently exists, but religious creed is not similarly protected. Finally, the Commission notes that religious liberty is deemed a fundamental right under the Federal and State constitutions while homosexuality or same sex marriage is not. See New Hampshire Constitution which gives legal protections for religious freedoms in Part I, Article 4, 5, and 6<sup>54</sup>:

**[Art.] 4. [Rights of Conscience Unalienable.]** Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience. *June 2, 1784*

**[Art.] 5. [Religious Freedom Recognized.]** Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship. *June 2, 1784*

**[Art.] 6. [Morality and Piety.]** As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies, corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established. *June 2, 1784 Amended 1968 to remove obsolete sectarian references.*

This section was denied by the Commission 5-7 on October 31, 2005 by roll call vote as follows:

**YEAS** – Brassard, Earnshaw, Fredyma, Mooney, Soltani.

**NAYS** – Barnes, Buckley, Butler, Fuller-Clark, Odell, MacKay, Prescott

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus

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<sup>54</sup> <http://www.state.nh.us/constitution/billofrights.html>

**CONCLUSION – MAJORITY REPORT**

The Commission concludes that the desire for companionship is strong and finding it is one of the greatest sources of joy and contentment in life. We believe that legitimate state roles can be found in encouraging or protecting relationships that contribute to society or at least not creating impediments to relationships that might not otherwise merit specific governmental aid or protection. As discussed above, we believe the state should seek to protect and foster marriage as the union of a man and a woman because of the critical contributions marriages make to children, parents and society. Although we understand the pleas that have been made to redefine marriage to permit same sex couples to qualify for it, we conclude that such a redefinition would change the very nature of marriage and cause a deterioration of this fundamental institution. We hope, nonetheless, that all citizens – gay and straight, opponents and supporters of gay marriage – will recognize that no disrespect is inherent in nor intended by the conclusions drawn by the Commission and that the Commission remains committed to a society free of discrimination. It is the hope of the Commission that readers of this Report will be mindful of the critical and complex role that marriage serves in our society as the legislature and society contemplate marital issues in the future.

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
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Chairman or Vice Chairman

\_\_\_\_\_  
Date