

**DATE:** April 23, 2013  
**TO:** House Committee on Judiciary  
Representative Carl Rhoads Chair  
Representative Sharon Har, Vice Chair  
**RE:** **Opposition/Comments on SCR166**  
Hearing Monday, 4/23/13, 10:30 am Rm. 325

My name is James Hochberg, and I have been a civil rights attorney in Honolulu since 1984. Currently I am also the president of Hawaii Family Advocates, a 501(c)(4) independent expenditure, non-candidate committee.

We are OPPOSED to SCR 166 which propose to convene a task force to study the social, economic, and religious impacts of enacting “marriage equality” in Hawaii. In our opinion, as elected officials, you should do the work of the task force and take responsibility for your decisions. You need to be accountable to the voters in this state and not push your responsibilities off on an unaccountable task force.

If, however, you decide to proceed any way, the task force envisioned in these resolution appears designed to result in a process that is biased in favor of same-sex marriage. Describing the focus of the task force as “marriage equality” rather than “same sex marriage” indicates the bias built into the resolution. This is not a new tactic in the study of homosexuality in Hawaii.

In 1995, I served as one of the seven commissioners on the Governor’s Commission on Sexual Orientation and the Law, which issued our report December 8, 1995. I wrote the Minority Report which is found here: <http://lrbhawaii.info/lrbrpts/95/sexor.pdf> . From the first moment, that Commission was strongly biased in favor of same-sex marriage. The conduct of the proceedings sought to eliminate any discussion of any topic other than why Hawaii should permit same-sex marriage. I am concerned that this or any other Task Force not result in the same biased efforts that completely wasted time and resources in 1995.

My concerns arise because the resolution itself is clearly biased in favor of same-sex marriage. In addition to the use of the words “marriage equality” instead of “same-sex marriage”, the following facts that are cited in the resolution also evidence the bias because of facts that are not also stated:

1. “WHEREAS, many of Hawaii's residents continue to believe that civil unions do not ensure equal treatment for all of Hawaii's people” but leaving out the equally true facts that although many people oppose civil unions and still others are satisfied with civil unions;  
and

2. “WHEREAS, same-sex partners in a civil union are excluded from the approximate 1,138 federal rights and benefits that are available to opposite-sex married couples” (this is misleading based on our prior task force work); and

3. “WHEREAS, the President of the United States, the Governor of Hawaii, Hawaii's entire Congressional Delegation, the Mayor of the City and County of Honolulu, and many members of the County Councils throughout Hawaii support marriage equality” but leaving out the fact that many residents and most legislators in Hawaii are opposed to same-sex marriage; these legislators actually have the responsibility for passing any same-sex marriage laws; and

4. “WHEREAS, there is substantial evidence that enacting marriage equality would have a significant economic impact on Hawaii” does not address the fact that it could be a very negative economic impact if Hawaii’s famous family-friendly brand is tarnished in the tourism industry;

The resolution then asks the Dean of the William S. Richardson School of Law at the University of Hawaii at Manoa to select the following members:

(1) Two esteemed members of Hawaii's legal community, preferably including at least one attorney who has served the State or one of the State's counties, or their designees;

(2) Two members of Hawaii's business community, including at least one member representing Hawaii's tourism industry, or their designees;

(3) One current or former clergy member, or the clergy member's designee;

(4) One member of a prominent community organization that advocates for marriage equality, or the member's designee; and

(5) One professor of economics from the University of Hawaii at Manoa who co-authored a study on the impact of same-sex marriage on Hawaii's economy and government, or the professor's designee;

This further insulates the elected officials from responsibility for the work of the task force. Why not require that one of the attorneys and one of the businessmen support and the other oppose same-sex marriage to assure balance? It is unconstitutional to use a religious test to serve on the commission so having a category of current or former clergy member can't stand. Why don't you have two of each category, with one supporting and the other

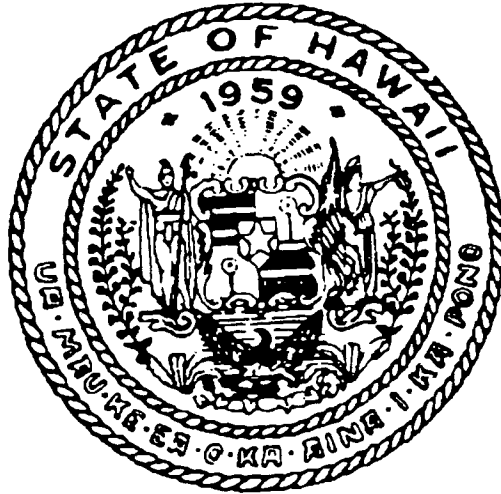


opposing same sex marriage? Selecting the prominent community organization that advocates for marriage equality is also plainly biased. The professor of economics who co-authored a study on the impact of same-sex marriage on Hawaii's economy and government is Sumner Lacroix or his co-author. He testified shamefully at our 1995 commission and was soundly rebutted by Professor Moheb Ghali. How about a balanced task force?

If you decide to go forward with the Task Force, I suggest that you include the requirement that the proceedings be videotaped and fed live on the internet from the first moment until the last so there is an unambiguous record of the proceedings. That is the only way you can make sure the work that is done is honest, unbiased and therefore useful to the people of Hawaii.

Sincerely,

James Hochberg, Esq.  
President



**Report of the Commission**  
**On Sexual Orientation**  
**And the Law**

**Thomas P. Gill, Chair**  
**Morgan Britt**  
**L. Ku'umeaaloha Gomes**  
**Lloyd James Hochberg, Jr.**  
**Nanci Kreidman**  
**Marie A. "Toni" Sheldon**  
**Bob Stauffer**

December 8, 1995  
ADVANCE COPY

## Chapter 5

### MINORITY OPINION

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

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

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

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

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

145. *Id.*

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

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

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

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

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

I. Introduction

A. Reason For Minority Opinion

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

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

B. Recommendations

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

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150. See Preface to this report at item IA.

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

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

### C. Summary

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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