

**Report of the**

**Vermont Commission on Family  
Recognition and Protection**

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## Introduction

The Vermont Commission on Family Recognition and Protection (the “Commission”) was established July 24, 2007, by joint action of the Speaker of the Vermont House of Representatives, Gaye Symington, and the President Pro Tempore of the Vermont Senate, Peter Shumlin, for the purpose of reviewing and evaluating Vermont’s laws relating to the recognition and protection of same-sex couples and the families they form. The Commission was charged with addressing, at a minimum, three particular issues:

1. The basis for Vermont’s separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples.
2. The social and historical significance of the legal status of being “married” versus “joined in civil union.”
3. The legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples.”

The Commission was asked to invite the input of a range of Vermonters on these questions, including scholars and experts, and the general public, as well, through a series of at least six public hearings. The Commission was directed to report its findings and recommendations to the Vermont House and Senate Committees on Judiciary by the end of April 2008. A copy of the Commission's charge is at Appendix A.

The Commission consisted of 11 members:

Tom Little of Shelburne (chair), attorney and former member of the Vermont House of Representatives

John Bloomer, Jr. of Rutland, attorney and former member of the Vermont Senate

Sen. John Campbell of Windsor County, attorney

Mary Ann Carlson of Arlington, counselor and former member of the Vermont Senate

Berton R. Frye of West Danville, quarry owner

Governor Phil Hoff of Burlington, former governor of Vermont

Rep. Johanna Leddy Donovan of Burlington

Barbara Murphy of Johnson, President of Johnson State College

Helen Riehle of South Burlington, Executive Director of Vermont Program for Quality in

Health Care, former member of the Vermont Senate and Vermont House of Representatives

Michael Vinton of East Charleston, polygrapher, retired state trooper, and former member the Vermont House of Representatives

The Rev. Nancy Vogele of White River Junction, Episcopal priest

The Commission held an organizational meeting on August 23, 2007, at the Vermont State House to discuss its charge, the format for its public hearings, and its work plan. At this meeting, the Commission discussed the scope and meaning of its charge and the charge's implications for the Commission's process, hearings, and the content of its report. The members also discussed what kind of hearings should be held, and whether the Commission should hold facilitated small group discussions as part of its work. The members reached a consensus that conventional "listening" sessions should form the basis of the hearing process, and that the hearings should be held in all corners of the state.

In September, the Commission announced a schedule of eight public hearings around the state:

October 10, 2007: Johnson, at Bentley Auditorium, Johnson State College

November 19, 2007: Lyndonville, at Lyndon State College

December 5, 2007: Brattleboro, at Brattleboro Middle School

December 10, 2007: St. Albans, at Bellows Free Academy

December 18, 2007: Montpelier, at the State House

January 12, 2008: Bennington, at Mount Anthony Union Middle School

February 2, 2008: Rutland, at the Godnick Adult Center

February 11, 2008: Williston, at Williston Central School Auditorium

The Commission also held a legal issues symposium at Vermont Law School in South Royalton on October 29, 2007. The Commission invited legal scholars to present testimony on the issues posed to the Commission in its charge. Presenters included:

Professor Peter Teachout, Vermont Law School

Professor Gregory Johnson, Vermont Law School

Mr. Monte Neil Stewart, President, Marriage Law Foundation

Professor Michael Mello, Vermont Law School

The Commission established a webpage on the General Assembly's website in order to post information about the Commission and its work.<sup>1</sup> Notice of the meetings and hearings was sent to all Vermont media outlets on two occasions prior to each event. Vermont Public Television aired the first organizational meeting of the Commission and broadcast the Lyndonville public hearing as part of its Public Square program, which was accompanied by an online stream and live web chat. News articles, editorials, and op-eds concerning the work of the Commission appeared in news outlets throughout the state, including: The Bennington Banner, The Brattleboro Reformer, The Burlington Free Press, The Castleton Spartan, The Barre-Montpelier Times-Argus,

The Rutland Herald, The St. Albans Messenger, Vermont Public Radio, WCAX TV, WPTZ TV, and a number of local cable television public access channels.

The Commission received over 100 written comments submitted through mail or e-mail in addition to the testimony received at the public hearings. These submissions and all documents submitted for the Commission's consideration are part of the Commission's record and are available for viewing at the Office of Legislative Council in Montpelier.<sup>2</sup>

## The Public Hearings

The Commission held eight public hearings. Attendance ranged from 80 (St. Albans) to 200 (Rutland), and roughly 30 persons testified at each hearing. As discussed below in this report, supporters of same-sex marriage outnumbered opponents by roughly 20 to one. The Commission began each meeting by handing out a memo describing the content of the hearings and the hearing format and courtesies. (Appendix B)

Each hearing was divided into two parts. The first part was an hour-long informative session on the history of recognition of the legal rights of gays and lesbians in Vermont. After the presentations, the public was invited to ask questions or discuss any of the issues raised.

Chair Little addressed the issues of adoption and anti-discrimination legislation in the 1990s. Based on the state's tradition of equality under the law and of strong families, for over 30 years, Vermont probate courts have qualified gay and lesbian individuals as adoptive parents. In addition, Vermont was one of the first states to adopt comprehensive legislation prohibiting discrimination on the basis of sexual orientation.<sup>3</sup> As the basis for our current discussion of marriage, Little reviewed the Vermont Supreme Court's 1999 decision in *Baker v. State*<sup>4</sup> which required the state to provide same-sex couples with the same legal benefits and protections afforded to married opposite-sex couples. In the opinion, Chief Justice Amestoy wrote:

*The extension of the Common Benefits Clause<sup>5</sup> to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.<sup>6</sup>*

The Court deferred to the General Assembly to fashion a remedy to the constitutional violation found in *Baker* and Little, chair of the House Committee on Judiciary in 2000, explained the legislative process and response to *Baker*. After months of debate, the civil union act was signed into law by Governor Howard Dean on April 26, 2000.<sup>7</sup>

Legislative counsel Michele Childs reviewed the work of the Civil Union Review Commission which was created by the General Assembly to facilitate implementation of the civil union law and monitor and evaluate the impact of the new law.<sup>8</sup> In its final report, the Commission concluded:

*The Commission's examination of the first eighteen months following the effective date of the civil union law reveals that the law is working as intended in Act 91. Act 91 satisfies the constitutional mandate of the Baker decision by providing to eligible same-sex couples who choose to join in civil union the benefits, protections and responsibilities that married couples have under Vermont law. In addition, Act 91 has brought no material adverse impacts on state government, on Vermonters, on the Vermont economy or the state generally.<sup>9</sup>*

Childs also provided a summary of the legal status and recognition of same-sex relationships in other states. Ten states and one district currently permit establishment of legally recognized same-sex relationships:

- Massachusetts is the only state that permits same-sex couples to marry.
- Vermont, Connecticut, New Jersey, and New Hampshire allow civil unions which provide all the benefits of marriage.
- California and Oregon have domestic partnerships that provide most all of the benefits of marriage.
- Hawaii has reciprocal beneficiary relationships, and Maine, Washington, and Washington, D.C. have domestic partnerships that provide some marital benefits.<sup>10</sup>

In contrast, Childs said that 41 states have state statutes defining marriage as the union of one man and one woman, and 27 states have added that definition of marriage to their state constitutions.<sup>11</sup> Only six states have no prohibition against same-sex marriage.<sup>12</sup> In addition to these laws, there are court decisions and attorney generals' opinions in various states that address whether an individual state will recognize a same-sex relationship celebrated in another state,<sup>13</sup> as well as the federal Defense of Marriage Act (DOMA) which was enacted in 1996 by Congress and signed into law by President Bill Clinton. It consists of two parts: 1) States that no state need recognize a marriage between persons of the same sex, even if the marriage was legally established or recognized in another state; and 2) Defines marriage for federal purposes to include only the union of one man and one woman.<sup>14</sup> According to Childs, this has created a complicated legal patchwork for determining the current and future rights of Vermont same-sex couples outside the borders of Vermont.

The second part of the hearings was devoted to taking testimony from members of the public. Anyone in attendance who wished to speak was given the opportunity, and testimony at each hearing averaged approximately two hours. The Commission suggested a time limit of three minutes per person and heard from over 240 people. Of those who testified, supporters of same-sex marriage outnumbered opponents by approximately 20 to one. With rare exceptions, the witness testimony and audience behavior were civil and respectful. Both sides commented that the hearings were a good opportunity to express their views on the issues.

The testimony of Vermonters at the Commission's hearings was broad in scope and presented many deeply personal descriptions of living with our state's civil union law. Some themes emerged from the public comments received through both personal testimony before the Commission and letters sent to the Commission. We have tried to summarize these comments for this report while acknowledging that it is impossible to cover all the concerns raised with the detail and nuances with which they were presented. Audio copies of the hearings and copies of correspondence are available at the Office of Legislative Council.



## **Testimony and Letters in Support of Allowing Gay and Lesbian Couples to Marry**

As mentioned above, the testimony and correspondence received by the Commission was overwhelmingly in favor of inclusion of gay and lesbian couples within the marriage laws. The following were the principally recurring themes from the testimony and letters.

### Civil unions are separate, but unequal.

The single, most common theme in the testimony around the state was that true equality cannot be achieved when there are two separate legal structures for conferring state benefits to couples based upon sexual orientation. According to many witnesses, denying same-sex couples access to the widely recognized institution of marriage while conferring the legal benefits under a parallel system with different terminology sends the message that same-sex couples are different from or inferior to opposite-sex couples and unworthy of inclusion in the marriage laws.

One woman who grew up on a dairy farm in Franklin as the youngest of 12 children, three of whom are gay or lesbian, wrote of how within her family all the siblings are treated the same, yet the community treats them differently.

*All of my siblings are either married or engaged to be married with the exception of the three siblings who do not have marriage as the option. This does not seem fair in this great country of opportunity and prosperity. The question of “why” enters my mind frequently. Why is it that nine of my siblings can share in all that marriage has to offer and yet, we (the gay/lesbian portion of the family) cannot? What is it about my [heterosexual] siblings that the three of us do not possess? We are all of similar make-up, educational backgrounds, family values, success in careers, and love for our children. The answer can only be that we (my two brothers and I) are not as valued by our fellow citizens as my heterosexual siblings. How can this be? . . . This is an astonishing realization.<sup>15</sup>*

Testimony urged that a separate system of recognition for same-sex couples violates fairness values deeply and widely held in Vermont and also violates the Vermont Constitution's Common Benefits Clause. While the civil union law requires that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage,”<sup>16</sup> in an attempt to create a separate but equal status, many who testified stressed that the very existence of a separate track for same-sex couples is unfair and creates an inferior status for same-sex couples and their families.

*In my experience with children [as a licensed psychologist-master], the fact that their parents cannot marry and have to have an alternative to marriage sends a*

*very bad message. It is no different than water fountains for “negroes” and “whites” 45 years ago. The message is, “your family isn’t good enough and therefore your parents are unable to marry.” No child should feel inferior because of the gender combination of their parents.*<sup>17</sup>

Witnesses often drew analogies between the civil union law and the U.S. Supreme Court's 1896 decision, *Plessy v. Ferguson*,<sup>18</sup> in which the Court upheld the constitutionality of a state law imposing racial segregation in public accommodations (specifically, railroad passenger cars), provided the accommodations were equal. Frequently during this testimony, the Commission heard comments about second class citizenship, stigmatization, and “separate cannot be equal.” Bishop Thomas C. Ely of the Episcopal Diocese of Vermont urged civil marriage equality for all Vermonters as a matter of civil rights.

*In the reality of our having lived with civil unions in Vermont for seven years now, we know that, as was true with school segregation, so too with civil unions and civil marriage: separate is not equal. Discrimination does continue, and while making provision for marriage equality for all couples here in Vermont will not end the discrimination against gay and lesbian couples in other states and in the federal laws, it will be an important step in the right direction.*<sup>19</sup>

Bishop Ely continued, explaining a position asserted by many of the clergy who testified before the Commission.

*The other point I want to emphasize tonight is that providing the civil right of civil marriage to heterosexual and homosexual couples alike would not compel any religious community to perform marriages of same-sex couples. The state allows ordained clergy and certain other designated religious persons to act as agents of the state with regard to civil marriage, but no clergy person is required by the state to do so. Different religious communities have different theological views on the subject of matrimony. The privilege and religious freedom to express and act upon those convictions is not compromised by the state providing civil marriage and the subsequent civil rights of marriage to all couples. It is my conviction that the church can and should support civil marriage for all - even if, at this time we are not of one mind about the church's involvement in these ceremonies.*<sup>20</sup>

Civil union status is not “portable” to other states.

Many witnesses with civil union licenses described the challenges, frustrations, and fears that the laws of most other states do not recognize their civil union status as the equivalent to marriage. The nonrecognition by other states (and countries) of the new and relatively uncommon legal status of civil union was often referred to by witnesses

as the lack of portability of civil unions. Civil union couples testified that when traveling outside Vermont, they take powers of attorney and other legal documents to prove their legal status but still have encountered confusion, disagreement, and nonrecognition in a variety of situations, some presenting significant risks. For example, there was testimony that government agencies, courts, and hospitals in other states fail, neglect, or refuse to understand or recognize civil union status. A witness at the Bennington hearing testified that a national employer with a Vermont operation denied employment benefits to an employee in a civil union while conceding that if the employee were married, the benefits would be provided.

A woman from Springfield told the Commission that she and her civil union partner went to great lengths to ensure that when her partner experienced problems during her pregnancy and delivery, she was treated in Vermont hospitals even though similar specialists were available in much closer proximity in a neighboring state. After the birth of the child, even though Vermont law provides that a child born during a civil union is presumed to be the child of both the civil union partners,<sup>21</sup> the woman who was not the biological mother of the child legally adopted her son to ensure that she would be recognized as his mother when traveling outside Vermont.

*No family should have to worry about which state to be in when a baby is born. No parent should have to worry that his or her infant could be considered parentless in a foreign state because that state does not recognize the civil union. Navigating medical emergencies is stressful enough for families without having to worry about these kinds of issues! Civil unions have gone a long way toward providing rights and benefits, but it has not made it possible to travel the country freely without being terrified that someone might not let you near in an emergency or might even refuse to recognize you as a parent.<sup>22</sup>*

While there is no guarantee that another state would recognize a Vermont same-sex marriage under similar circumstances, from the consistent testimony received at the hearings, it is clear that many gay and lesbian couples would feel less vulnerable when trying to assert their legal rights outside this state if they could say they are married rather than in a civil union.

Civil unions are less likely than marriage to be recognized by the federal government.

Federal law specifically denies recognition of same-sex marriages or unions that are treated like a marriage. Many witnesses shared experiences about how their civil union partners would not be entitled to Social Security or veteran's survivorship benefits because they were not recognized as spouses under federal law. Others shared complicated stories of immigration issues that would not have been a problem if the civil union partner were recognized as the married spouse. While it is unlikely at this time that the federal government will recognize a same-sex marriage any more than a civil union, many couples believe that they would be on firmer ground to assert such

rights and that gaining marital status in Vermont would allow them to establish standing to challenge federal law in court.

The differences in language between civil union and marriage are powerful.

A significant number of witnesses testified that the differences in language between marriage and civil union status perpetuate treating gays and lesbians and their families as different, as “other,” with stigmatizing results.<sup>23</sup>

A man from Randolph wrote about how his father refused to attend his civil union ceremony while he happily attended the marriage of the man’s gay brother in Massachusetts a short time later.

*My father emphatically would not attend a civil union ceremony. In his mind, a civil union was something for and about gay people. Not gay himself, he felt apart from it, and was unable to conceptualize a role for himself in this gay ceremony. . . [In attending my brother’s wedding, my] father understood what marriage means, and he understood his social role in welcoming a new son into his family through marriage. A marriage meant something to my father that a civil union could in no way replicate. . . I urge you to consider the deep social significance that marriage has, and to acknowledge in your report to the State Legislature the inability of civil unions to replicate that.<sup>24</sup>*

Witnesses stressed that words and how words are used in our language are very important, symbolic, and powerful. Marriage is the “gold standard” for many couples and a term which everyone understands. A justice of the peace in Coventry said he has certified several civil unions and his participation in those ceremonies led him to believe that gay and lesbian couples should be afforded the right to marry:

*The civil union ceremony itself is discriminatory for several reasons. It does not allow the use of the words marry, marriage, wed, wedding, husband, and wife. All these words have deep personal value to all who are united in a committed relationship. The pronouncement at the conclusion of a civil union is weak in comparison to that of a marriage ceremony. It is clear to me as a justice of the peace who was instructed by the secretary of state that we must not discriminate against gays and lesbians, that I was doing exactly that by being restricted to a ceremony that was void of valued word.<sup>25</sup>*

Many witnesses who have civil union licenses described situations, in Vermont and elsewhere, when seeking the benefit of the civil union law, in which they were forced to explain their civil union status, what a civil union is, and how a civil union by law secures a legal status and consequences equal to marriage. The consequences of these conversations include: (i) “outing” oneself as gay or lesbian in situations where this is unnecessary, irrelevant, or a breach of privacy; (ii) the frustration of the additional time it often takes to explain successfully what a civil union is; and (iii) the difficulties

encountered when using government, business, employer, and health care forms and documents that do not contemplate or appropriately deal with the status of being in a civil union.

A woman who worked for a business in central Vermont told the Commission that her employer, a self-insured company, denied health benefits to her civil union partner while providing such benefits to all the other employees with spouses. When the woman inquired about the disparate treatment, she said the CEO compared civil union couples to employees who live with their boyfriend or girlfriend, but did not equate them with married couples.

*We believed that part of the CEO's failure to take civil unions seriously was his unfamiliarity with them and that the term "civil union" was nebulous enough to allow him to automatically dismiss our relationship. Had full marriage rights been accorded to lesbian and gay couples in Vermont, it is still possible that we would have been excluded from coverage, but we still believe that it would have been much harder for the CEO. . . to dismiss our relationship as insubstantial and casual.*<sup>26</sup>

#### Civil union couples experience more governmental and health care paperwork and hurdles.

Many witnesses testified that civil union couples face more complicated income tax filing requirements than do married couples, resulting in higher tax preparation fees for them and often higher taxes. For example, for purposes of Vermont income tax, civil union partners are treated as if married and must file their Vermont income tax return as either "Civil Union Filing Jointly" or "Civil Union Filing Separately." However, because federal tax law does not recognize civil unions, this is a filing status for Vermont only. To complete the Vermont return, civil union partners are instructed to prepare a federal return, apply the federal rules as if they were married, and complete the standard Vermont return using income based upon the specially prepared federal return, rather than the one actually filed with the IRS. Civil union couples must attach both the "dummy" federal return and the real federal return to the Vermont tax return.

Witnesses also mentioned how, due to lack of recognition of civil union partners as spouses by federal tax law, an employer's health care contribution to coverage of an employee's civil union partner or the partner's dependents must be considered imputed income for federal tax purposes. While Vermont does not consider the employer's contribution to be income, and the employee is not taxed at the state level for the employer's contribution, these types of inconsistencies between state and federal law create additional costly burdens that married couples do not have to endure.

#### Children thrive in civil union families.

Witnesses at every hearing testified about the ability of gay and lesbian couples to raise healthy, happy children in a stable, safe, and loving family environment. These

witnesses included couples, their friends and families, their children, school teachers, and clergy. These witnesses' experience, dating back prior to the enactment of the civil union law, is that children who are raised in same-sex couple families are as well adjusted as children of heterosexual couples. A school administrator wrote:

*[In my professional role] I have seen the loving home and rich opportunities that have been available to students regardless of whether they have two moms, two dads, or a mom and a dad. I have observed that commitment and a loving home are not gender based – but correlate highly with stability. Granting same-sex couples the right to marry would enhance a healthy sense of belonging and stability for all children in our schools.*<sup>27</sup>

Many witnesses spoke of the evolving nature of the family structure. Many children are raised today by single parents or in “blended” families with one biological parent and a stepparent and step- or half-siblings. Extended families are making a comeback with older generations living closer to children and grandchildren and participating in one another’s daily lives. These witnesses asserted that failure to recognize the changing family dynamics by favoring a traditional-looking “Leave it to Beaver” family while not supporting a less traditional family when both are looking for a stable environment in which to raise children does a disservice not only to families but to communities as well.

*The legal concept of family is only broadened, made more flexible, when we open our hearts and minds by thinking outside of the traditional box. From what I can see, traditional views of marriage do not offer a guarantee of stability to the family. We all know too many dissolved marriages, broken homes, and fractured families. . . We need to give equal rights to these “non-traditional” couples. Having stable, non-traditional families in our neighborhoods can only increase the value of our more traditional one and strength our communities.*<sup>28</sup>

Witnesses uniformly testified that while civil union status has improved the legal structure supporting these families, there are significant shortcomings compared to the legal status of marriage.

The “sky didn’t fall” when civil unions were enacted; there is no harm extending marriage to all couples.

This testimony asserted that the dire consequences predicted by many for Vermont upon enactment of the civil union law did not come to pass. They observed that tourism did not disappear, state government was not overburdened, Vermont did not become a “gay mecca,” and “traditional” families were not harmed. Similarly, these witnesses testified about their experience in that there is no basis to support the fear that there would be

any real harm from granting full marriage access. Frequently mentioned by both heterosexual and homosexual witnesses was the belief that same-sex marriage presents no threat to heterosexual marriage.

*My wife, Donna, and I have been together for 25 years. . . The idea that same-sex marriage would hurt opposite-sex marriage makes no sense to me. As human beings, we live in a community and rely on one another. During [a health care] crisis, friends took care of our house, colleagues filled in at business, and the hospital honored our relationship. If our friends who are same-sex partners are denied the same right to marry which we enjoy, then their strength, well-being and stability are undermined, which compromises the entire fabric of the community we rely on.<sup>29</sup>*

Civil marriage should be a secular legal right for everyone.

Many supporters of extending the right to marry to same-sex couples emphasized that the debate before us now is about civil marriage, not religious marriage.

*As a member of the clergy, I experience and “witness” this issue from a religious perspective, but I am able to distinguish between my religious preferences and what should be the rights of all Vermont citizens. Religious recognition (or non-recognition, for that matter) of same-sex unions is a separate issue. I do believe that my experience as a minister gives me a unique and valuable vantage point on this issue, but speaking as a plain citizen of Vermont, shedding my clerical robes, I would argue simply that civil marriage is an issue of civil rights.<sup>30</sup>*

These witnesses felt strongly and testified with passion that individuals’ personal religious beliefs about homosexuality and marriage should not play a part in determining who should have the protection of state-granted legal rights. Witnesses were respectful of the fact that people of different faiths may have very divergent beliefs on this topic, and that it was valid for members of a particular faith to determine whether they would acknowledge or sanction same-sex unions or marriage within their faith. However, according to these witnesses, religious beliefs should not dictate whether secular state laws are applied equally to all families, gay or straight. A member of the clergy from Enosburg testified:

*It goes without saying that the laws of the state should not be dictated by the principles of any one religion. State laws are for the good order of the state and the benefit of its citizens, and must not favor one group over another. So I think it is not valid to argue that marriage should be only between a man and woman because the Bible or other religious tradition says it must be so.<sup>31</sup>*

*Our marriage laws are an anomaly. We proclaim separation of church and state, yet in this one instance we make ministers of religion, by the very fact of their ordination, officers of the state. As my colleague John Morris has pointed out in his history of marriage, I baptize children, but I do not sign their birth certificates. I preside at funerals, but I do not sign death certificates. But when I officiate at a wedding, I am obligated to sign the marriage certificate in order for the couple to be legally married – unless they have had a prior ceremony. As an officer of the state, I am constrained by the laws of the state in performing an action that is simultaneously a matter of state law and of religious practice.*<sup>32</sup>

Witnesses, especially clergy, frequently commented that the combination of the civil and the religious within the marriage laws is a significant obstacle to equal protection under the law. They stated their belief that separation of church and state is imperative to a well-functioning government and community.

*Why do we not separate the legal contract of marriage from the religious blessing of the couple? The sanctity of marriage is on tension with the legality of marriage. Since 50% of all marriages end in divorce, I would argue the reality of that “sanctity.” Although I continue to support religious marriages, including those of the GLBT community, I desire a more realistic understanding of the contract and a more grounded understanding of the covenant.*<sup>33</sup>

#### Vermont is ready to take the next step.

Some witnesses observed that what Vermont has learned since enactment of civil unions is not what problems it created, but rather that a civil union license is not as good as and is not equal to a marriage license. Many said that the civil union law was a step in advancing the civil rights of gay and lesbian Vermonters, but not a sufficient step and certainly, for them, not the last step. For these witnesses, and there were many of them, Vermont is now “ready” to move to full access to marriage for lesbian and gay couples.

*We say that parties to a civil union have all the same sights as parties to a marriage – but there is one right that is missing – the right to call that legal contract a marriage. The civil union law was a good step at a time when many Vermonters were not ready for a bigger change. We tried it out, it has worked fine and now I say that it is time for us to take off the training wheels. . . We already have a perfectly good word to describe the pact between two people who pledge to live their lives together. The word is marriage. Let’s use it. We don’t need civil unions anymore.*<sup>34</sup>

*We live in changing times and must move forward, state by state, in giving all family members the rights they deserve. Let Vermont be the next state to move forward and set an example for others to follow.*<sup>35</sup>



Similar testimony came from the youngest witnesses, those in high school and college, many of whom asked the Commission and the General Assembly to focus on the loving nature of a relationship and not the sexual orientation involved.

The Commission believes this testimony reflects the evolution of attitudes in Vermont since the enactment of Act 91 toward greater and more open acceptance of gays and lesbians in Vermont society, community, and public life.

## **Testimony and Letters in Opposition to Allowing Gay and Lesbian Couples to Marry**

While the testimony and correspondence received by the Commission in opposition to inclusion of gay and lesbian couples within the marriage laws was in the minority, people who did express their thoughts did so with conviction. The following were themes from these submissions.

Civil unions granted legal benefits to same-sex couples, and Vermont should not invite another divisive debate on this issue.

This testimony urged that the civil union law has done everything compelled by the *Baker v. State* court decision, arguing that any deficiencies are caused by federal laws, which are beyond the control of Vermont law. The testimony clearly suggested that a legislative effort to establish gay marriage in Vermont would be an unwelcome and deeply divisive experience for Vermonters who oppose it.

*Gay marriage would. . . continue to drive a wedge between left and right – making something that should no longer be an issue another point of contention. . . [I]f we are ever to enjoy a state of compromise in this country, I think this issue is one that calls for it. It is time to leave well enough alone.*<sup>36</sup>

Same-sex marriage fundamentally misunderstands the institution and role of marriage.

This testimony presented the institution of marriage as having a meaning and role in society prior to, above, and beyond the legalities of marriage. One witness stated that “marriage is absolute,” meaning that the General Assembly cannot, and should not, alter or attempt to alter the fundamental meaning and structure of marriage as a heterosexual, one man–one woman relationship. Several witnesses observed that the institution of marriage has served the common good of the people of the state well, is proven to be safe and nurturing for children, and should not be tinkered with on account of asserted individual rights. Several of these witnesses characterized or defined homosexuality, or homosexual behavior, as a lifestyle choice that should not be endorsed by the state.

*I am vehemently opposed to homosexual marriage on the basis that marriage is ordained by God between one man and one woman. Marriage has been defined as between one man and one woman throughout history and it has served our civilization perfectly and will continue to do so. To allow the same sex to marry would be only to make the real meaning of marriage change to suit a small minority’s desires. . . I believe this is not a civil rights issue, but a lifestyle choice that is trying to be made acceptable to the mainstream population.*<sup>37</sup>

Traditional marriage derives from biblical truths and values and should be protected.

A majority of the witnesses opposed to same-sex marriage included comments or arguments relying on their understanding of the meaning and authority of Christian scripture, in both Old and New Testaments of the Bible. These witnesses urged the state to not stray from the Christian truths and values that, in their judgment, have guided this country for so long.

*I realize that a union between two consenting males or two consenting females does not at first view seem abusive or harmful as some other forms of sexual behavior which are legally prosecuted, but for our government to officially and legally open the door to accept and promote a behavior that goes against God's warnings is clearly to invite distress in days to come.*<sup>38</sup>

*We are Biblically opposed to homosexual marriage and civil unions, not because we hate homosexuals but because we do hate the sin they are in, because God does. What they are doing is in complete opposition to God's moral laws as stated in the Bible in many places. It also erodes the country, as families fall apart and there is more crime and heartbreak, kids committing suicide[,] using drugs[,] having sex and babies out of wedlock – all because we are not following God's moral laws.*<sup>39</sup>

## Legal Issues Symposium

In order to address the legal issues implicit within the Commission's charge, the Commission contacted Vermont Law School to request the assistance of Vermont legal scholars. The law school offered Professor Greg Johnson and Professor Michael Mello, both of whom have written extensively on the issue of civil unions, and Professor Peter Teachout, a scholar of the Vermont Constitution. The Commission also invited Mr. Monte N. Stewart, Esq., former law professor and current president of the Marriage Law Foundation, who has published numerous articles on marriage.

The Commission provided the presenters with five questions, derived from the three components of the Commission's charge and asked that the attorneys focus their testimony on these questions:

1. What are the legal consequences between marriage and civil union in Vermont? In terms of legal benefits, protections, rights, and obligations, what does a marriage license deliver you that a civil union license does not? Do these differences raise any statutory, common law, or constitutional law issues?
2. Which states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts or Canada?
3. In terms of tangible legal consequences, including recognition by other states or the federal government, what identifiable advantages or disadvantages would a lesbian couple with a Vermont marriage license have that it does not have with a Vermont civil union license?
3. What decided cases and/or pending litigation (including challenges to state or federal Defense of Marriage Act laws) are there which bear on these questions? What do the reported DOMA cases tend to say?
4. Why did the Massachusetts court reach a different conclusion from the Vermont court? Was there any significance for these reasons for the Vermont civil union law?
5. As posed by the charge to the Commission, what is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?"

The Commission spent an afternoon at Vermont Law School hearing from the four legal scholars. The afternoon provided the Commission with valuable information and an interesting range of views and opinions. The Commission members had the opportunity to ask questions of each scholar, and this clarified certain points and enabled the speakers to delve into some areas in greater detail.

The following are short synopses of the presentations at Vermont Law School. Copies of written submissions of the presenters are available at the office of legislative council.

### Professor Greg Johnson

Professor Johnson began his testimony by informing the Commission that he is a gay rights advocate and supports permitting same-sex couples to marry. However, he said that he saw his role that day as informative rather than persuasive and hoped to be of assistance in helping the Commission understand the changes across the country since the civil union law was enacted in 2000.

In response to the first question about the legal consequences between marriage and civil union, Professor Johnson testified that extending marriage to same-sex couples in Vermont would not deliver any new legal rights and benefits to those couples. The civil union act specifically grants same-sex couples “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”<sup>40</sup> He noted that there are some 1,096 federal rights and benefits of marriage that civil union couples cannot enjoy because of the federal Defense of Marriage Act (DOMA),<sup>41</sup> which defines marriage for purposes of federal law as only the union between one man and one woman. Professor Johnson explained that the few judicial and administrative decisions regarding DOMA have held that the act prohibits same-sex couples from accessing federal benefits whether they are in a civil union or a marriage, and, thus, he did not believe that granting Vermont same-sex couples the right to marry would provide them with the federal legal benefits of marriage.

Professor Johnson testified that the question that is currently being debated in the courts is whether the establishment of a separate system to deliver marital rights to gay and lesbian couples is inherently unequal and therefore violative of constitutional guarantees of equal protection under the laws. The Court in *Baker* did not require the state to issue marriage licenses to same-sex couples and deferred to the General Assembly to determine how the benefits could be granted to same-sex couples. The Court left open the possibility that a later case may establish that anything but a marriage license falls short and is, therefore, unconstitutional. Johnson explored whether a gay or lesbian couple's lack of access to the word “marriage” is, under the *Baker* decision's analysis by Chief Justice Amestoy, a violation of the Vermont’s Commission’s Common Benefits Clause and suggested that this is a close call.

Johnson said that the Massachusetts Supreme Judicial Court considered this exact issue and when asked by the Massachusetts Senate whether civil unions were permitted under the decision in *Goodridge v. Dept. of Health*.<sup>42</sup> “In a 4-3 vote, that court, citing *Brown v. Board of Education*, said flatly that separate is never equal.<sup>43</sup> The court used language drawn from the civil rights movement of the 1960’s:

*The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is considered a choice of language that reflects a demonstrable*

*assigning of same-sex, largely homosexual, couples to a second-class status...The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits...The history of our nation has demonstrated that separate is seldom, if ever, equal.”<sup>44</sup>*

However, according to Johnson, in *Kerrigan v. Connecticut* a Connecticut Superior Court addressed the same question and came to a different conclusion, stating that it had “been unable to find any case in which the mere difference in nomenclature applied to two groups” who otherwise received the same legal benefits raised equal protection issues. Thus, the Connecticut Superior Court found no constitutionally significant differences between civil unions and marriage.<sup>45</sup>

With respect to recognition of Vermont civil unions in other jurisdictions, Johnson said there are eight states that have recognized the legal rights of such unions: New Hampshire and California through statute; Connecticut, New Jersey, and New York through a state attorney general’s opinion; and Massachusetts, Iowa and West Virginia through a judicial decision. Massachusetts same-sex marriages are legally recognized in four states: as civil unions in New Hampshire by statute and in New Jersey by attorney general opinion, and as marriages in Rhode Island and New York by attorney general opinion. According to the Vermont Attorney General’s Office, Vermont would most likely recognize a Massachusetts marriage as a civil union.<sup>46</sup>

In response to the question of whether a civil union might have a better chance than a same-sex marriage of being recognized in another state, Professor Johnson said that while there are arguments for both sides, “the bottom line is that whatever the same-sex relationship is called, the chance of it being recognized in other states is slim.” The general rule of marriage recognition is called the “place of celebration” rule which is the idea that a marriage is valid everywhere if it is valid where it was celebrated. However, a state does not have to recognize the marriage if it violates the strong public policy of that state.<sup>47</sup> Additionally, the federal DOMA specifically states that no state is required to recognize a same-sex relationship treated as a marriage in the state in which it was celebrated.<sup>48</sup>

Johnson told the Commission that as of today, 26 states have amended their constitutions to limit marriage to one man and one woman and 19 states have enacted statutes to that effect, while 17 states have amended their constitutions to prohibit the recognition of any same-sex relationship, including civil unions. These state prohibitions are commonly referred to as “state DOMAs” or “mini-DOMAs.” According to Johnson, litigation to overturn state DOMAs faces substantial challenges based on current court precedents, except where a state DOMA prohibits recognition of any same-sex relationship and lacks any rational basis for the discrimination.

In addressing the reasons for the separate legal structure for recognizing and protecting same-sex couples versus heterosexual couples, Johnson told the Commission that the concerns in 1999 expressed by both the Court in *Baker* and the General Assembly with respect to making a sudden change in the marriage laws were legitimate at the time,

considering that no state had come close to recognizing same-sex marriage or the equivalent of civil unions. Johnson praised the Court and the legislature for taking the incremental approach as the best way to address a divisive issue. “Yet,” said Johnson, “times have changed dramatically in just seven short years. What was once radical is now blasé.”

Professor Johnson concluded his presentation by suggesting that the civil union law may be a good transition law for Vermont, but if Vermont enacts same-sex marriage, in his judgment the civil union law should remain as an option for those who want its legal protections and status but who cannot embrace the institution of marriage for a variety of historical and other reasons. “I ascribe to a model which would give couples a wide range of choices...The fullest flowering of freedom in relationship and family choices would come when we break away from the limited binary view of marriage or nothing.” (*Professor Johnson’s written testimony can be found at Appendix C.*)

#### Professor Peter Teachout

Professor Teachout opened his remarks with a discussion of his view that the General Assembly has the right and responsibility, independent of the Vermont Supreme Court, to make judgments on what the Vermont Constitution means and requires.

He observed that the *Baker* decision did not decide that marriage, per se, for gay and lesbian couples, is compelled by the Common Benefits Clause. Rather, the decision was fundamentally about the legal consequences of marriage, its protections, benefits, and responsibilities. In his judgment, this bundle of legal incidents is what *Baker* compels for same-sex couples. He distinguished this from the Massachusetts case, *Goodridge*, which focused on marriage in a holistic, all-encompassing way.

Teachout contrasted the *Opinion of the Justices*, in which the Massachusetts Supreme Judicial Court found civil unions are not equal to marriage, and *Kerrigan*, in which a Connecticut Superior Court found no significant difference between civil unions and marriage, in an effort to ascertain why two courts which were presented with the same question would come to different conclusions. Differences in state constitutional provisions, different modes of analysis, and different approaches to constitutional philosophy and judicial functions all may have played a part. This is why, according to Teachout, it is not only permissible but appropriate for the Vermont General Assembly to come to its own conclusion about what the constitution requires in terms of equality.

Professor Teachout concluded his remarks by noting that, in his opinion, *Baker* requires equality between those with marriages and those with civil unions. He said that the General Assembly and the Court each have their own role and authority to determine what constitutes “equality” and that the General Assembly is provided with far greater latitude in which to make that determination. He urged the General Assembly to evaluate the civil union law by looking at Article 7 of Chapter I of the Vermont Constitution and

to make its own judgment about equality and fairness, perhaps with the result of a voter advisory referendum as part of a public education process.  
(*Professor Teachout's written testimony can be found at Appendix D.*)

Monte N. Stewart, Esq.

Mr. Stewart presented the case for marriage as a vital social institution whose meaning and value are intrinsically, inseparably, and universally (across time and geography) bound to the traditional legal and social union of one man and one woman. Mr. Stewart said that this meaning of marriage yields important and valuable “social goods” for our society, including the optimum family structure for nurturing and raising of children. He spoke of the right of a child to grow up with and bond with his or her biological mother and father as interwoven with the social goods derived from traditional marriage.

For Stewart, “the man/woman meaning [of marriage] is essential to the production of these social goods. . . . If the union of a man and woman ceases to be a core constitutive meaning of marriage, that institution, probably sooner rather than later, will cease to provide those particular social goods.” Stewart said that even if the Vermont legislature were to enact same-sex marriage, same-sex couples would not be brought into the social institution of traditional marriage. The enactment of “genderless marriage” would, however, suppress or de-institutionalize the established meaning of marriage, and result, in time, in a loss of the social goods associated with traditional marriage.

*Vermont will certainly not be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, Vermont will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.*

Stewart agreed with the other presenters that a Vermont marriage license would not afford a gay or lesbian couple any more legal rights at the state level and that Vermont has no authority to alter a couple's federal benefits, protections, rights, and obligations. The only “non-speculative ‘advantage’” of a marriage license would be to grant a couple legal standing to seek recognition of that Vermont same-sex marriage in another jurisdiction. He said the “real reason for the marriage battle in Vermont” is the *social* benefits, protections, rights, and obligations and that proponents of same-sex marriage are incorrect when they assert that inclusion of gay and lesbian couples within the marriage laws will enhance the social status and well-being of those families.

*Vermont law has no power to usher same-sex couples into the venerable man/woman marriage institution; all Vermont law can do is suppress the man/woman institution, fabricate in its place the radically different genderless*



*regime, and then assure that the marriage of no couple in this State (whether man/woman or same-sex) is legitimate unless sanctioned by that regime.*

Stewart said that with respect to the federal DOMA, all legal challenges to date have failed and that he believes the law would be upheld if it were before the U.S. Supreme Court. In regard to the state DOMAs, Stewart said 20 of 21 appellate courts that have addressed the issue have upheld bans against same-sex marriage, including nine decisions

post-*Goodridge*. In addressing both the *Goodridge* and *Baker* decisions, Stewart indicated that these cases were an anomaly and said that both courts used a similarly flawed approach to reach a predetermined result.

Stewart referred the Commission to his published law review articles on the subject for a more detailed explanation of his position on same-sex marriage and subsequently provided the members with copies of his article “Marriage Facts.”<sup>49</sup>

*(Mr. Stewart’s written testimony can be found at Appendix E.)*

#### Professor Michael Mello

Professor Mello told the Commission that the thesis of his presentation would be that “[t]he time has come to give civil unions a respectful burial.”

*The burial must be respectful: recognizing that, in 2000, civil unions were a courageous and pioneering step in the journey toward marital equality between same-sex and opposite-sex couples, and recognizing as well that a legislator’s vote for civil unions in 2000 was nothing short of heroic...But it must be a burial. Same-sex marriage in Vermont is an idea whose time has come.*

Professor Mello said that “political reality” in 2000 was, in his judgment, the only reason for the separate legal status of civil unions. He recounted the “backlash” to the *Baker* decision and the political fallout for legislators who supported civil unions. It was a tumultuous time that he believes “unleashed an avalanche of homophobia in Vermont...Gay marriage was perceived to have been not politically possible.”

Mello discussed the evolution of gay marriage in Massachusetts and why the Massachusetts Supreme Judicial Court rejected civil unions. He explained that after that Court ruled that the state constitution required same-sex marriage, the Massachusetts Senate began considering a bill to enact civil unions. The Senate requested an advisory opinion from the Court as to whether such an enactment would satisfy its decision in *Goodridge*. As Professor Johnson had noted earlier, the Court concluded that creating a separate system for delivering marital benefits to gay and lesbian couples would be unconstitutional because “separate is seldom, if ever, equal.”

Mello believes that the Massachusetts court was correct in its analysis and that Vermont’s civil union law fails the Common Benefits Clause’s mandate for equality

under the law as well. The inequalities include the stigmatization, or “badge of inferiority,” experienced by civil union couples compared to their heterosexual colleagues who have access to marriage and its history and social status. Mello noted that during the civil union debates in the legislature, supporters of the compromise made a point of telling opponents that civil unions were not the same as marriage and went further to define marriage as the union of “one man and one woman” three times in Act 91. Mello said that

*because this demarcation was at the core of the arguments made by the statute’s legislative supporters, the new law sends same-sex couples the same message of second-class matrimonial citizenship that the separate-but-equal doctrine sent to racial minorities in the six decades before Brown v. Board of Education.*

Permitting gay and lesbian couples to marry in Vermont would provide those couples with legal and practical benefits, specifically as they relate to the issue of portability, said Mello, in part because same-sex marriage in Massachusetts is limited to residents of that state. Mello hypothesized that because Vermont civil unions are open to out-of-state couples, perhaps Vermont same-sex marriages would be as well, which would provide those out-of-state couples the opportunity to test the issue of portability in their home states and in the U.S. Supreme Court.

In conclusion, Professor Mello said that he would encourage the general assembly to take up the issue and to try to enact full access to marriage for gay and lesbian couples. If the legislature fails to take action, he suggested that he expects the constitutionality of civil unions will be before the Vermont Supreme Court again and that the Court would ultimately find that Act 91 violates the Vermont Constitution for the same reasons the Massachusetts Court found civil unions to be inadequate under its constitution. *(Professor Mello’s written testimony can be found at Appendix F.)*

## Additional Submissions

In addition to the many letters and email messages expressing “pro” and “con” views on the ultimate question of whether Vermont should open its marriage laws to gay and lesbian couples, the Commission received a few submissions of note that impact the Commission’s consideration of its charge with respect to the legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples. We address these here in brief and include copies of them in the appendix.

### Jacqueline S. Weinstock, Ph.D.

University of Vermont Professor Jacqueline S. Weinstock sent a letter to the Commission on behalf of herself and sixteen University social sciences and education faculty members. In it she reviewed the last 20 years of social science research on same-sex parented families and took issue with sampling and data analysis methods of studies that “demonstrate negative outcomes to children raised in same-sex parented families.”

The letter addresses five common concerns of those who oppose extending marriage to same-sex couples and asserts that children raised by same-sex parents are, by and large, no different than their peers who are raised by opposite-sex parents. The letter's conclusion is that the peer-reviewed studies support the conclusion that the quality of family life is more important than family structure. (Appendix at G). She said:

*If we as Vermonters are mainly concerned with the welfare of all children, we would take heed of the broadly accepted conclusion among social scientists based upon the available knowledge to date, that “family structure, in itself, makes little difference to children’s psychological development. Instead, what really matters is the quality of family life.”*

### Vermont Secretary of State Deborah L. Markowitz

Deborah L. Markowitz explained in a letter to the Commission that she is one of the state officials who respond to inquiries about civil unions because of her office’s regulation of town clerks who issue civil union licenses and justices of the peace who perform civil union ceremonies. She said she has responded to numerous telephone calls and emails from people inquiring about the validity of a Vermont civil union in other states and to “many questions about whether individuals who were not resident[s] of Vermont could dissolve their Vermont civil unions.” In order to obtain a dissolution of a civil union or a divorce in a marriage, one of the parties must be a resident of Vermont for at least one year. Because marriages are universally recognized in all jurisdictions, a couple who marries in Vermont can get a divorce anywhere. However,

because recognition of civil unions is limited outside of Vermont, a couple who obtains a civil union in Vermont is significantly restricted in its ability to have its union dissolved and may have to move to Vermont or another jurisdiction that recognizes the union to do so. Ms. Markowitz wrote that she has concluded that “individuals who have obtained a civil union in Vermont do not experience the same benefits as those individuals who have a Vermont marriage. Specifically, a [civil union] couple who leaves the state often ends up in legal limbo.” (Appendix at H).

### Beth Robinson, Esq.

Attorney Beth Robinson testified at the Commission's Bennington hearing and submitted a letter dated February 27, 2008. Ms. Robinson was co-counsel to the plaintiffs in *Baker v. State* and chairs the Vermont Freedom to Marry Task Force, an advocacy organization. Ms. Robinson identified six areas in which she finds the civil union law deficient, and in each she cited specific examples where the status of civil marriage would bring tangible, positive changes to civil union couples, including:

1. A host of privately conferred financial benefits and protections awarded by third parties on the basis of marriage (including health insurance).
2. Security in traveling from state to state (sometimes called “portability”).
3. Critical federal protections (including social security survivor benefits, family-friendly immigration laws, and benefits for military spouses).
4. Participation in an institution that carries considerable personal significance for many, and undeniable social significance.
5. A legal status that is widely understood throughout the country and the world, communicating familial commitment.
6. Inclusion and equality. (Appendix at I).

The Commission notes that one of the key issues before it is whether, and to what extent, tangible changes would occur simply with the enactment of same-sex marriage in Vermont. The unambiguous testimony of over 240 Vermonters around the state is that they want an opportunity to show that such a change in law would make a difference in their daily lives.

### Report of the Vermont Civil Union Review Commission

Although the final report of the Vermont Civil Union Review Commission was released six years ago, we mention it here as a reminder that a good deal of careful work was done in 2000-2001 to examine the implementation of Act 91 and its impacts on the state during that period. That report contains findings and recommendations that may give perspective to this report. Among its conclusions was that Vermonters with civil unions should expect continued nonrecognition of their status under federal law.

## The Commission's Findings

Although the Commission did not undertake a scientific public opinion poll, the Commission's careful listening process lays the foundation for certain findings, or conclusions, with a strong degree of credibility. In some cases, the findings are statements to which the witnesses testified. In other cases, the findings are statements of fact about the legal consequences of civil unions in Vermont.

1. Those who testified in support of full access to marriage for gay and lesbian couples far outnumbered those who testified in favor of maintaining the civil union status quo or against same-sex marriage.
2. Vermonters who chose to attend the Commission's hearings on the equality of civil unions and whether Vermont should permit same-sex marriage have strong feelings about the issues. At first blush, this may seem obvious or inconsequential but the Commission believes that it bears further comment. While the civility of the hearings was evident, both "sides" continue to believe passionately in their respective judgments and understandings.
3. Vermonters with civil union licenses testified that they are being denied the full promise of Act 91. They have encountered a multitude and variety of instances where they find the promise of equality to be unfulfilled. They find many of these instances to be significant, if not substantial, deficits in the civil union law, with clear and negative financial, economic, and social impacts on their lives and the lives of their children and families. In addressing the Commission's charge, these witnesses find "legal and practical challenges [with civil union]... as compared to heterosexual marriage couples."
4. The legal recognition of same-sex relationships varies greatly from state to state. Eight states currently recognize a Vermont civil union, while four states recognize a Massachusetts same-sex marriage. Recognition of these relationships has taken the form of statute, judicial decision, and attorney general opinion, but it has been outnumbered by the legislative and electoral efforts to prohibit such recognition. Forty-four states and the federal government have adopted various "Defense of Marriage" statutes, constitutional amendments, or both to deny legal recognition to same-sex marriages.<sup>50</sup> An additional 17 states prohibit recognition of a civil union.
5. Regardless of formal recognition in some states, the legal status of parties to a civil union is generally foreign and difficult to explain when Vermonters travel to other states. These hurdles to the "portability" of civil unions can be either a minor or major inconvenience but can also present more dire consequences when the health and welfare or fundamental legal rights of a member of a civil union couple is at stake.
6. While the testimony identified clear, significant differences between the benefits, privileges, and responsibilities attached to a civil union versus a heterosexual marriage,

the extent to which enactment of same-sex marriage would eliminate these differences is not clear. That is, a Vermont same-sex marriage could share many, perhaps most, of the deficiencies of a Vermont civil union, considering the non-recognition of both by federal law and by the laws of all but a handful of the states. However, the Commission finds that such a change in the law would give access to less tangible incidents of marriage, including its terminology (e.g., marriage, wedding, married, celebration, divorce), and its social, cultural and historical significance. This also would likely enhance the portability of the underlying legal consequences of the status. Further, providing statutory access to marriage would be a clearer and more direct statement of full equality by the state, a statement of full inclusion of its gay and lesbian residents in the bundle of rights, obligations, protections, and responsibilities flowing from the status of civil marriage. The tangible same-sex marriage benefits described by Beth Robinson in her testimony and letter raise serious questions about the operation of the civil union law and warrant additional research and serious attention.

7. As requested in the Commission's charge, we find that the basis for Vermont's separate legal structures – marriage and civil union – is a combination of the passionate, volatile political dynamics prevailing in the General Assembly in 2000 and the belief that a separate legal structure in the form of Act 91 remedied the constitutional flaw declared in the *Baker v. State* decision.

8. The two legal statuses have different social and historical significance. “Marriage” evolves and carries the benefits and burdens of thousands of years of human experience unique to a male-female social institution. The testimony underscored why lesbian and gay couples desire access to the word “marriage,” its current and historical meaning and significance, and how they and many others believe that it is their constitutional right. The testimony from the small number of persons who testified to the contrary revealed the passion with which they wish to exclude same-sex couples from access to this word. This testimony, in nearly every case, was based expressly on religious beliefs and faith.

9. The social science of the relative benefits or harms of heterosexual versus homosexual marriage for families and children is beyond the scope of the Commission's charge. There is credible social science research supporting the conclusion that raising children in a gay or lesbian coupled family, per se, has no negative impacts on the well-being of children. As noted below, the Commission believes that this area deserves further study.

## The Commission's Recommendations

### 1. Areas for Additional Study and Review.

The Commission's hearing process provided a forum around the state for Vermonters to express their views on how the civil union law is working and on whether Vermont should permit gay and lesbian couples access to civil marriage. The process was a simple and straightforward one of asking Vermonters to testify and of listening to their thoughts, views, and concerns. The Commission took best advantage of the time available from its volunteer membership, and while our methods were not scientific, the Commission believes this report fairly reflects what is in the hearts and minds of Vermonters.

Nonetheless, the Commission recommends further study and review of the following areas:

- What has been the experience of the Massachusetts lesbian and gay couples who have married under Massachusetts law? Are these couples successfully obtaining all of the rights, privileges, and benefits of marriage – under Massachusetts law, federal law, and the laws of other states? Are their marriages more readily understood and more portable than a Vermont civil union?
- Can the Vermont income tax system be revised by statute or administrative action to ease the burden that civil union couples face in preparing and filing their returns?
- What is the best science available today on the different impacts on children raised in different family structures? Is there a consensus in the research community? How should social science affect the debate over same-sex marriage? How can the research be scrupulously and objectively evaluated before it influences policy-making and legislative action?
- If Vermont were to move to full access to marriage for Vermont's lesbian and gay couples, how should the state address the many civil union licenses already issued? Should civil union status remain for those who may want it? Should a civil union couple seeking marriage be required to waive or rescind that license at the time of joining in civil marriage? Or should a civil union couple's license be automatically converted by statute to a marriage license? These are only a few of what are likely to be many such transition questions should Vermont enact same-sex marriage.

2. The Commission's charge does not ask it to make a specific recommendation on whether Vermont should grant gay and lesbian couples access to civil marriage. The

Commission believes that making such a recommendation would undercut the purpose and usefulness of its work and this report. Simply put, we were asked to listen to the testimony of Vermonters on these issues, to look at the legal issues, and to report on what we found. It is the role of Vermont's policy-makers and elected officials to read and reflect on this report and in their best judgment determine what steps to take in their role as public servants of the people of Vermont. Accordingly, the Commission does not reach that recommendation.

3. The Commission recommends that Vermont take seriously the differences between civil marriage and civil union in terms of their practical and legal consequences for Vermont's civil union couples and their families. Their testimony and the testimony of their friends and supporters was sincere, direct, impassioned, and compelling. Act 91 represents Vermont's commitment to the constitutional equality and fairness for these citizens, and Vermont should preserve and protect that commitment.



### **Acknowledgements**

The Commission expresses its gratitude for the diligent and cheerful support of two persons. Michele Childs is the attorney from the General Assembly's Office of Legislative Council who provided research, drafting, and all-purpose assistance to the Commission and its members as the Commission toured Vermont. Her assistance was conscientious, insightful, and cheerfully given. Rosalind Daniels of the Legislative Council's administrative staff provided staff and administrative support to the Commission, keeping us organized and scheduled. She also compiled the record of the Commission's work, including the volumes of materials submitted over the last eight months.

The Commission members also are grateful for the opportunity to engage in the Commission's work, around the state in public hearings, in dialogue and debate with each other, and in careful reflection in preparing this report. We are hopeful that the Commission's work will be a guide to Vermonters now and in the future.

Respectfully submitted on behalf of the entire Commission, April 21, 2008.

Thomas A. Little, Chair

## Endnotes

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- <sup>1</sup> <http://www.leg.state.vt.us/workgroups/FamilyCommission>
- <sup>2</sup> 115 State Street, Montpelier, VT 05633; 802-828-2231.
- <sup>3</sup> Act No. 135 of the 1991 Adjourned Session (1992).
- <sup>4</sup> 744 A.2d 864 (1999).
- <sup>5</sup> The Common Benefits clause states: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal." Chapter I, Article 7, Vermont Constitution. See also the discussion of the Common Benefits Clause at pages 8-22 in the Vermont Supreme Court's decision, *Baker v. State* (Docket no, 98-032), December 20, 1999 (170 Vt. 194, 744 A. 2d 864).
- <sup>6</sup> *Baker*, supra note 3, at 889.
- <sup>7</sup> Act No. 91 of the 1999 Adjourned Session (2000).
- <sup>8</sup> *Id.* at Sec. 40.
- <sup>9</sup> 2002 Report of the Civil Union Review Commission. Copies may be obtained at <http://www.leg.state.vt.us/misc/issues.htm>
- <sup>10</sup> *Same Sex Marriage, Civil Unions and Domestic Partnerships*, National Conference of State Legislatures, March 2008.
- <sup>11</sup> *Id.*
- <sup>12</sup> Connecticut, Massachusetts, New Jersey, New Mexico, New York, Rhode Island.
- <sup>13</sup> Eight states have recognized a civil union from another jurisdiction and four states have recognized a same-sex marriage from another jurisdiction.
- <sup>14</sup> 28 U.S.C. §1738C and 1 U.S.C. § 7.
- <sup>15</sup> Letter of Martha R. Rainville, March, 2008. The author of this letter noted that she is not the former Vermont National Guard Adjutant General.
- <sup>16</sup> 15 V.S.A. § 1204(a).
- <sup>17</sup> Letter of Kristin Williams Propp, M.A., Bennington, Vt., February 28, 2008.
- <sup>18</sup> 163 U.S. 537; *overruled, Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (separate educational facilities for black and white students are inherently unequal and therefore violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).
- <sup>19</sup> Testimony of the Right Reverend Thomas C. Ely, Episcopal Bishop of Vermont, Montpelier, Vt., December 18, 2007.
- <sup>20</sup> *Id.*
- <sup>21</sup> 15 V.S.A. § 1204(f).
- <sup>22</sup> Letter of Lisa Rae, March, 2008.
- <sup>23</sup> Marriages are "solemnized," while civil unions are "certified." Individuals in a marriage are "spouses," while individuals in a civil union are "parties to a civil union." Spouses get a "divorce," while parties to a civil union get a "dissolution."
- <sup>24</sup> Letter of Bennett E. Law, Randolph, Vt., March 3, 2008.
- <sup>25</sup> Letter of Ala B. Fletmarch, Coventry, Vt., March 2, 2008.
- <sup>26</sup> Testimony of Madeleine and Naomi Winterfalcon, Monkton, Vt., February 11, 2008.
- <sup>27</sup> Letter of Michael Freed-Thall, March 3, 2008.
- <sup>28</sup> Letter of Jon J. Wittenbecher, Pownal, Vt.
- <sup>29</sup> Testimony of Steven K-Brooks, Brattleboro, Vt., December 5, 2007.
- <sup>30</sup> Letter of Reverend Bruce Johnson, Norwich, Vt., March 4, 2008.
- <sup>31</sup> Testimony of Linda M. Maloney, Priest in Partnership, St. Matthew's Episcopal Church, Enosburg Falls, Vt., October 10, 2007.
- <sup>32</sup> *Id.*
- <sup>33</sup> Letter of Rev. Adrienne Carr, The First Congregational Church, Burlington, Vt., December 14, 2007.
- <sup>34</sup> Testimony of Colleen Montgomery, Burlington, Vt., February, 2008.

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- <sup>35</sup> Letter of Mary Feidner, North Bennington, Vt., February 28, 2008.
- <sup>36</sup> E-mail of Lou Magnani, October 15, 2007.
- <sup>37</sup> Letter of Priscilla Mahnker, Lyndonville, Vt., November 22, 2007.
- <sup>38</sup> Testimony of Rose Lepeltier, St. Albans, Vt., October 10, 2007.
- <sup>39</sup> Letter of Donald and Lynette Cutting, Irasburg, Vt., January 21, 2008.
- <sup>40</sup> Supra note 15.
- <sup>41</sup> Supra note 13.
- <sup>42</sup> 798 N.E.2d 941 (Mass.2003). The Massachusetts Supreme Judicial Court ruled that the state had no "constitutionally adequate reason" for denying marriage to same-sex couples. Instead of creating a new fundamental right to marry, the court gave the state legislature 180 days to change the law to rectify the situation.
- <sup>43</sup> *Opinion of the Justices*, 802 N.E.2d 565 (Mass. 2004).
- <sup>44</sup> *Id.* at 569-70.
- <sup>45</sup> 909 A.2d 89 (Conn. Super. 2006).
- <sup>46</sup> Commission staff counsel Michele Childs prepared a Memorandum to the Commission on Vermont recognition of same-sex marriages from other states, dated December 10, 2007. The Memorandum is at Appendix J. The Commission has subsequently learned that a Vermont family court has recognized a Canadian same-sex marriage for purposes of granting the couple, one of whom is a Vermont resident, a divorce.
- <sup>47</sup> Vermont courts have held that a marriage contract will be interpreted in this state according to the laws of the state in which it was entered into, so long as to do so does not violate Vermont public policy. See *Poulos v. Poulos*, 169 Vt. 607, 737 A.2d 885, 886 (1999).
- <sup>48</sup> Supra note 13.
- <sup>49</sup> 31 *HARVARD JOURNAL OF LAW & PUBLIC POLICY* 1 (Winter, 2008).
- <sup>50</sup> Forty-one states have statutory DOMAs and 27 states have defined marriage as the union of one man and one woman in their state constitutions.