

THE LEGAL, MEDICAL, ECONOMIC & SOCIAL
CONSEQUENCES
OF NEW JERSEY'S
CIVIL UNION LAW



Final Report of the New Jersey
Civil Union Review Commission

December 10, 2008

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SUMMARY AND INITIAL STATEMENT OF URGENCY FOR EQUALITY

We, the thirteen members of the New Jersey Civil Union Review Commission, unanimously issue this final report, containing a set of recommendations to the Governor and the Legislature of the State of New Jersey. After eighteen public meetings, 26 hours of oral testimony and hundreds of pages of written submission from more than 150 witnesses, this Commission finds that the separate categorization established by the Civil Union Act invites and encourages unequal treatment of same-sex couples and their children. In a number of cases, the negative effect of the Civil Union Act on the physical and mental health of same-sex couples and their children is striking, largely because a number of employers and hospitals do not recognize the rights and benefits of marriage for civil union couples.

In one case, a doctor's delay in understanding the nature of a couple's civil union exacerbated an already difficult situation. During the summer of 2008, Gina Pastino, a Montclair resident, was admitted to the emergency room because she was at risk for a potentially fatal cardiac arrhythmia. She describes her experience:

I gave them all of my relative information, including the fact that... Naomi and I are civil union partners, please give her all of the information when she does arrive, here is my consent...By the time that Naomi arrived at the hospital, I was in a state where I really couldn't talk to her... I really couldn't tell her what was happening to me, what any of the test results were.... So, [Naomi] asked the attending emergency room physician to tell her what was happening with me.... And he said, "who are you?" And she said, "well, I'm her partner." And he said, "I can't give you any information, you know, I need her consent." And I wasn't in any state of mind to give my consent... And she had to explain to him what civil unions were. And he wasn't, you know, quite sure at first. He was reluctant to give my information. He did not understand, and hadn't heard of civil unions before.¹

Before getting any information about Gina's condition, Naomi was forced to spend time educating the doctor about what civil unions are, while standing in the corridor, rather than either of them being at the patient's bedside. In Gina's

testimony to the Commission, her frustration was palpable: “So...once again, we were faced with an emergency medical crisis that was potentially life-threatening, and here she is having to...justify who we are to each other.”²

This is but one of many examples derived from the testimony before the Commission during the past 18 months. The experience of this couple amply demonstrates that the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples. Even if, given enough time, civil unions are understood to provide rights and responsibilities equivalent to those provided in marriage, they send a message to the public: same-sex couples are not equal to opposite-sex married couples in the eyes of the law, that they are “not good enough” to warrant true equality.

This is the same message that racial segregation laws wrongfully sent. Separate treatment was wrong then and it is just as wrong now.

The Commission is compelled to issue its final report now because of the overwhelming evidence that civil unions will not be recognized by the general public as the equivalent of marriage in New Jersey with the passage of time.

Since the Commission issued its February 2008 report, a similar commission in Vermont has issued a report detailing how the Vermont civil union law – in effect since July 1, 2000 – still does not provide the legal, medical and economic equality of marriage. Nearly a decade later, civil union couples in Vermont report the same obstacles to equality that New Jersey civil union couples face today.

The Commission has also heard additional evidence that a marriage law in New Jersey would make a significant difference in providing equality and dignity to same-sex couples and their children. Though federal law fails to recognize same-sex relationships as marriage, the Commission finds that a marriage law in New Jersey would help to alleviate the disparate treatment of same-sex couples, including denial of benefits, as testimony to the Commission has shown to be the case in Massachusetts.

Equally important is psychological harm that same-sex couples and their children endure because they are branded with an inferior label. An associate professor of psychiatry at Harvard Medical School told the Commission:

Based on research and my years of working with gay people who have experienced stigma or discrimination on the basis of sexual orientation, I believe that second-class citizenship, now institutionalized in some states in the form of civil unions, contributes to increased rates of anxiety, depression and substance-use disorders in marginalized populations.³

Other mental health experts, as well as a number of same-sex couples in New Jersey and their children, have underscored before the Commission the significant psychological damage caused by not recognizing marriage for same-sex couples. Their heartbreaking testimony, some of which is included in this report, brings to life their struggle in a way that no numbers – whether complaints filed with government agencies or advocacy organizations – can encapsulate on their own.

As a result of the overwhelming evidence presented to the Commission, we unanimously recommend that:

The Legislature and Governor amend the law to allow same-sex couples to marry;

The law be enacted expeditiously because any delay in marriage equality will harm all the people of New Jersey; and

The Domestic Partnership Act should not be repealed, because it provides important protections to committed partners age 62 and older.

Overview of the New Jersey Civil Union Review Commission

On December 12, 2006, the Legislature enacted Public Law 2006, Chapter 103, establishing civil unions for same-sex couples effective February 19, 2007 (hereinafter the “Civil Union Act”). The intent of the Civil Union Act is to provide all the benefits and responsibilities of marriage to same-sex couples in civil unions.⁴ It also established the New Jersey Civil Union Review Commission (“the Commission” or “CURC”), to evaluate the effectiveness of the law and report to the Legislature and Governor.⁵

The Commission is an independent body consisting of ex-officio government members and public members. The seven public members are appointed as follows: five appointed by the Governor with the Advice and Consent of the Senate, one appointed by the Senate President, and one appointed by the Speaker of the General Assembly. The six ex-officio members consist of the Attorney General, the Director of the Division on Civil Rights, and the Commissioners of the Departments of Human Services, Banking and Insurance, Children and Families, and Health and Senior Services.⁶ The members of the Commission are as follows:

Public Members:

- Rev. Charles Blustein Ortman - Appointed by Senate President
- Steven Goldstein, Esq. - Appointed by the Speaker of the General Assembly

- Robert Bresenhan, Jr. - Appointed by Governor
- Stephen J. Hyland, Esq. - Appointed by Governor
- Barbra Casbar Siperstein - Appointed by Governor
- Elder Kevin E. Taylor - Appointed by Governor
- AnnLynne Benson - Appointed by Governor

Ex-Officio Members:

- J. Frank Vespa-Papaleo, Esq. - Director of the Division on Civil Rights
- Melissa H. Raksa, AAG - Designee of the Attorney General
- Barbara G. Allen, Esq. - Designee of the Department of Human Services
- Linda Schwimmer, Esq. - Designee of the Department of Banking & Insurance
- Joseph A. Komosinski - Designee of the Department of Health & Senior Services
- Erin O'Leary, Esq. - Designee of the Department Children and Families

For purposes of convenience and operational consistency, the Commission has been formally placed in, but not of, the Department of Law & Public Safety. As of the date of this report, the Legislature has not issued any appropriation for the costs of operating the Commission, which include the costs of transcription services, certified interpreters, advertising associated with public notices, mileage reimbursement for public members attending meetings, and other operational and administrative costs. Since there has been no legislative appropriation for the operations of the Commission, it receives substantial fiscal and staff support from the Division on Civil Rights.⁷ Additionally, the Division provides to the Commission other in-kind support such as website services, photocopying and conference-calling expenses, and other necessary operational costs. Because the Commission does not have its own appropriation, it has been unable to commission any independent studies of the issues and instead has relied upon the testimony of experts and studies prepared independently by academic or governmental institutions.

The Commission is charged with studying all aspects of the Civil Union Act including, but not limited to the following:

- (1) To evaluate the implementation, operation and effectiveness of the Civil Union Act;
- (2) To collect information about the Act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations;
- (3) To determine whether additional protections are needed;

- (4) To collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution;
- (5) To evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage;
- (6) To evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage; and
- (7) To review the "Domestic Partnership Act," and make recommendations as to whether this act should be repealed.⁸

According to the Civil Union Act, the Commission "shall report semi-annually its findings and recommendations to the Legislature and the Governor." This final report is unanimously endorsed by the members of the Commission.

Since issuing its report in February 2008, the Commission held eight public hearings, taking testimony from individuals and families affected by the Act, representatives of various advocacy organizations and experts in a number of professional disciplines including psychology, social work, finance, law and statistics. Notice of all public meetings and hearings was advertised in newspapers throughout the State, on the Commission's website located at www.NJCivilRights.org/curc, and distributed widely by community organizations, website hosts and others. The Commission website also serves as a repository for Commission meeting dates, reports, transcripts, agendas, commissioner biographies, contact information and other items.

This report will not recite all the testimony provided at public hearings or submitted in writing to the Commission. Rather, this report will highlight relevant testimony that corresponds to the Commission's legislative charge. In taking public testimony, the Commission followed the same procedures and practices utilized by the Legislature and other commissions and state boards when permitting individuals to testify, and the Commission formally approved all written submissions as part of the Commission's official record. For anyone interested in reviewing all the public testimony, all transcripts of the public hearings are available at the Commission's website located at www.NJCivilRights.org/curc.

In its interim report, the Commission reached the following conclusions:

- 1. For the overwhelming majority of civil union couples who testified, the federal Employment Retirement Income Security Act, commonly known by its acronym ERISA, is the reason employers have given for not recognizing their civil unions.**

- 2. In Massachusetts, a marriage law has prompted many employers to provide equal benefits to same-sex wives or husbands.**
- 3. The testimony presented by many civil union couples indicated that their employers continue to discriminate against them, despite their familiarity with the law.**
- 4. Civil union status is not clear to the general public, which creates a second-class status.**
- 5. The Civil Union Act has a deleterious effect on lesbian, gay, bisexual, transgender, and intersex youth and children being raised by same-sex couples.**
- 6. Many witnesses testified about the unequal treatment and uncertainties they face during a health care crisis, particularly in hospital settings.**
- 7. Institutional interaction with civil union couples has been less than optimal.**
- 8. Testimony indicates that the Civil Union Act has a particularly disparate impact on people of color.**
- 9. The requirement that same-sex couples declare civil union status, a separate category reserved for same-sex couples, exposes members of the United States military to the “Don’t Ask, Don’t Tell” policy.**
- 10. The classification of civil union may place marital status in question when one of the partners is transgender.**

Since the Commission issued its interim report, there have been a number of national developments advancing marriage for same-sex couples. On May 15, 2008, the Supreme Court of California, citing, in part, the New Jersey Civil Union Review Commission’s First Interim Report, ruled that excluding same-sex couples from civil marriage is unconstitutional. On November 4, 2008, a majority of California voters voted for passage of Proposition 8, which denies marriage for same-sex couples. As of the date of this report, the validity of Proposition 8 rests with the courts. In July 2008, the Massachusetts Legislature repealed a 1913 law that had prohibited non-residents from marrying in Massachusetts if their marriage would be void in their home states. Thus, couples from other states are permitted the right to marry within Massachusetts. And, on October 10, 2008, the Supreme Court of Connecticut ruled that failing to give same-sex couples the full rights, responsibilities and name of marriage was against the equal protection

clause of that state's constitution. In so doing, the Court recognized that marriage carries with it a status and significance that the classification of civil unions does not and that segregating opposite-sex and same-sex couples into separate institutions is constitutionally impermissible.

I. CONSISTENT THEMES OF TESTIMONY BEFORE THE COMMISSION

Since its formation in 2007, the Commission has taken oral testimony and received written submissions from more than 150 people. The testimony has focused primarily on the implementation and impact of the Act and whether additional legal protections are necessary. The testimony generally falls into two categories. The first is testimony critical of the Act's ability, in practice, to provide civil union couples with all of the same benefits, protections and responsibilities of marriage and corresponding testimony in support of marriage. The second is testimony opposing marriage, and in some cases, criticizing the existence of the Act itself. The Commission received testimony, both oral and written, overwhelmingly indicating the necessity of marriage. The following summarizes the recurring themes of this testimony.

A. A separate legal structure is never equal.

The most common theme in the testimony was that true equality cannot be achieved when there are two separate legal structures for conferring benefits on couples based upon sexual orientation. According to many witnesses, denying same-sex couples access to the widely recognized civil institution of marriage while conferring the legal benefits under a parallel system using different nomenclature, imposes a second-class status on same-sex couples and sends the message that it is permissible to discriminate against them. In assessing the inequitable nature of civil unions, many witnesses alluded to the African-American community's struggle for equal rights. One witness observed:

[T]he issue before you is nothing more than the old issue of separate but equal. We know from the tragic story of segregation that there is no such thing as separate but equal. Just as people should not be forced to ride in the back of the bus because of race, people should not be forced to ride in the back of the legal relationship bus because of sexual orientation. Civil unions ... are the back of the legal relationship bus.⁹

B. The word “marriage” conveys a universally understood and powerful meaning.

Many witnesses testified that the difference in terminology, between “marriage” and “civil union,” stigmatizes gays and lesbians and their families because they are singled out as different. Witnesses stressed that words are incredibly important and powerful and that marriage is a term of “persuasive weight” that everyone understands and respects. As one witness observed, “marriage is still the coin of the realm.”¹⁰

Many witnesses who are in civil unions described situations in which they were forced to explain their civil union status, what a civil union is, and how it is designed to be equivalent to marriage. These conversations include the indignities of having to explain the legal nature of their relationship, often in times of crisis, and the obstacles and frustrations encountered when using government, employer, or health care forms that do not address or appropriately deal with the status of being in a civil union. Many expressed surprise and dismay at the lack of recognition despite the Act’s having been in effect since February 2007.

C. Children would benefit by society’s recognition that their parents are married.

Numerous witnesses testified that Lesbian, Gay, Bisexual and Transgender (LGBT) couples raise happy, healthy children in a loving family environment. These witnesses included couples, their friends and families, their children, and clergy.

Many witnesses noted that the labeling of civil union couples, not as married but in a civil union, has a detrimental effect on their families, showing children that their parents are different or somehow less than others, which can lead to teasing and bullying. Many witnesses observed that when the government treats people differently, it emboldens private citizens of any age to follow suit. As a lesbian high school teacher testified, “I don’t hear racist remarks, but I hear the, ‘Oh, he’s so gay, that’s so gay’...I think ... if the laws were changed, it would give that much more oomph to not expressing prejudice.”¹¹

D. There is uncertainty about the recognition of civil unions in other states.

A number of witnesses testified that civil unions put same-sex couples at a disadvantage while traveling, for they bear a categorization that is misunderstood or not understood at all either at home or abroad. Civil union couples testified that when traveling outside New Jersey, they take powers of attorney and other

legal documents to prove their legal relationship to one another and to their children. Confusion as to the labels applied to same-sex relationships and resulting misunderstandings can lead to both intentional and unintentional discrimination and hardship.

As an increasing number of jurisdictions recognize a same-sex marriage, much of the testimony suggests that New Jersey couples would feel less vulnerable when trying to assert their legal rights in the remaining states if they could say they are married rather than in a civil union.

II.

THE EFFECT OF THE CIVIL UNION ACT ON SAME-SEX FAMILIES

A central mandate of the Commission is to “evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage.”¹² The Commission heard considerable testimony addressing this issue.

A. Civil unions perpetuate economic harm to same-sex couples.

In its interim report, the Commission reported that the federal Employee Retirement Insurance Security Act (ERISA) is the most common reason that employers cite when refusing to provide the same benefits to employees’ civil union partners as are provided to married employees’ spouses. The Commission reaffirms that finding. The Commission also gathered evidence from Massachusetts’ experience that the term “marriage,” were it applied to the relationships of same-sex couples, could overcome a number of the challenges presented by ERISA and would therefore make a significant difference in providing equality even with no change in federal law.

Under ERISA, “self-insured” companies - companies which create their own insurance plans but may hire outside agencies to administer them - are governed by federal law rather than state law. In turn, because of the federal Defense of Marriage Act (DOMA), any federal statute or regulation that provides benefits to spouses, husbands, wives, or married couples applies only to marriages between one man and one woman, thus resulting in covered employers continuing to discriminate against same-sex couples.

Practically speaking, companies covered by ERISA, which comprise an estimated fifty percent of all companies in New Jersey, have an option, rather than a requirement, to offer equal benefits under the state’s Civil Union Act. Many companies are not exercising that option, even if State law, as is the case in New Jersey, provides that spouses and civil union partners are entitled to identical treatment.

As the Commission conveyed in its interim report, being in a civil union can have a negative economic impact on couples whose civil unions are not recognized by their employers. In that report, the Commission cited as an example a registered nurse from Commercial Township who testified that she received a letter from her employer, telling her that the hospital where she works would not be providing health insurance for her partner, citing the ERISA loophole. Because of the lack of insurance coverage, the nurse told the Commission:

[M]y partner and I have seriously considered dissolving our civil union, because it has put us in a tremendously precarious financial position. Because now in the event that something happens with her and she has no insurance coverage, our entire estate is in jeopardy, rather than just half.¹³

Among the many witnesses who have appeared before the Commission have been civil union couples who spoke of similar economic hardship because employers have invoked ERISA to decline to provide benefits.

Since its first report, the Commission has gathered evidence that employers' invocation of ERISA has not lessened with the passage of time. If anything, the worsening economy seems to be encouraging employers to cut corners wherever they can, with equality for LGBT employees and their same-sex partners being among the casualties.

For example, the Commission heard testimony from a retired employee of Johnson & Johnson. When he sought to access retirement benefits for his civil union partner, J&J invoked ERISA as a reason for denying his partner's application for health benefits although they would offer such benefits to the spouses of retirees. Ironically, if the witness were currently employed by J&J, his partner would be eligible for benefits.¹⁴ Testimony has indicated that this is not an isolated case.

The uncertain economy is also increasing the invocation of ERISA by employers who provide health care coverage to employees through collective bargaining agreements.

Rosemarie Cipparulo, Esq., a labor attorney at Weissman & Mintz, teaches collective bargaining at the Rutgers University School of Management and Labor Relations. She represents labor unions and employees throughout the state, including a New Jersey-based employee of the shipping company DHL, which has invoked ERISA to deny equal benefits to the employee's partner. Cipparulo testified that:

The sluggish economy and the high unemployment rate combine to reduce any union's bargaining and strike leverage.... Simply maintaining

health and pension benefits in collective bargaining at this time is the labor movement's number one task, and it's difficult just to maintain the status quo.

Because a legislative compromise resulted in civil unions rather than marriage for same-sex couples, unions are now put in the position of having to negotiate the extension to an additional class of people in this most difficult of times, and it's not easy. Given the escalating costs, employers are simply not willing to add anyone and most often are trying to scale back the provision of health and pension benefits.

Adding civil union partners is virtually impossible to do at this time in this climate at the bargaining table. However, we already have benefits for married couples in our agreements. The key here, as is often in contracts, as you all know, is the language. Simply calling the joining of two people 'marriage' rather than 'civil unions' means we don't have to negotiate or rewrite the contract language....

The fact is that just changing the language 'civil union' to 'marriage' changes the situation, because everyone agrees that married people and their spouses are entitled to health insurance and pensions. It's already in our agreements. We wouldn't have to expend any leverage on society's failure.¹⁵

When asked about whether the anti-discrimination clauses in many collective bargaining agreements would apply, Cipparulo testified:

The problem there is that the insurance provider does not recognize the civil union to be the equivalent of marriage. The result is a refusal to extend the benefits.¹⁶

The testimony suggests that employers may decline to provide insurance and health benefits to civil union partners not because of an objection to the government recognition of same-sex couples, but because of the term used by statutes establishing government sanctioned, same-sex relationships. In fact, the Commission heard no testimony from civil union couples indicating that employers have refused to comply with the Civil Union Act because of personal objections to the law.

Some witnesses commented on the psychological impact in the workplace of separate legal status. They noted it is demoralizing for LGBT employees working side by side with straight employees to receive different benefits.¹⁷

Unequal benefits are not the only economic hurdles same-sex couples face. Dr. Leslie Gabel-Brett, Director of Education and Public Affairs for Lambda Legal,

noted that an economic burden falls on the shoulders of same-sex couples and their children who cannot afford legal representation when things go wrong.¹⁸ As the Commission recognized in its interim report based upon the testimony it heard, these economic challenges disparately impact people of color and members of other traditionally marginalized communities. The State Public Advocate acknowledged the particular difficulty for lower-income same-sex couples who encounter discrimination because they have fewer resources with which to seek legal counsel and redress and who have difficulty meeting expenses if faced with reduced healthcare benefits.¹⁹ Many witnesses confirmed they had expenses associated with preventative actions designed to protect them despite having entered civil unions. For example, many couples in civil unions had legal documents such as Medical Powers of Attorney prepared for out-of-state travel or medical emergencies.²⁰

B. Civil unions create challenges to equal health care access.

Testimony received prior to and since this Commission's interim report confirms that many civil union couples receive unequal treatment in health care, particularly during medical crises. As noted in this report's summary, Gina Pastino testified before the Commission on October 15, 2008 about difficulties that arose when she was admitted for emergency medical treatment in the summer of 2008. At an earlier Commission hearing, Ms. Pastino testified about similar challenges she and her civil union partner experienced when faced with having to explain their family relationship while dealing with medical emergencies. As examples, Ms. Pastino described an incident when their son developed a dangerously high fever that would not respond to medication, and another when her partner needed emergency medical treatment. She echoed the sentiments of other witnesses, noting that she and her civil union partner "also had to take the time before we left to go to the emergency room to make sure we had our healthcare power-of-attorney, our power-of-attorney, all the necessary documents."²¹

In her testimony cited in the Commission's interim report, Laurin Stahl expressed her shock and frustration when staff at two different New Jersey hospitals questioned whether her civil union partner was her "legal" partner, and staff at one of those hospitals asked her for a copy of her civil union certificate. Although she advised hospital staff that her civil union partner had authority to make medical decisions on her behalf, she was not convinced that staff would consult her partner if such decisions were needed.²²

In another case, a witness from Plainfield testified that when he was admitted to a New Jersey hospital for emergency surgery in April 2007, his civil union partner was not allowed to see him, and was removed by hospital security.²³

In yet another case, a woman from Central New Jersey wrote to the Commission about her experience on the internet in trying to get health care for her partner

of 19 years. This couple would be particularly harmed by a deprivation in health care coverage, for they are raising one child with multiple disabilities and another child with Asperger's Syndrome, a form of autism.

I'm just writing to add to the saga of "civil unions not being marriages." I recently changed jobs and my new employer has us enroll for insurance via the internet. The only choice offered in the system was "domestic partners" and apparently dental/vision coverage wasn't an option here. The system refused to take 'spouse' since we were of the same gender.... It sent up a "Warning: This can't be your spouse because employee and dependent are of the same gender" message.²⁴

Such challenges for same-sex couples persist despite directives from the New Jersey Department of Health and Senior Services (DHSS) regarding the implementation of the Civil Union Act. John Calabria, Director of the DHSS unit that, among other things, oversees licensure of health care facilities, testified that in February 2007, the DHSS Commissioner issued a memo regarding the Civil Union Act to all licensed health care facilities in New Jersey. As Calabria explained, that memo notified all facilities that, as of February 19, 2007:

[T]he act requires that all persons in a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage....[A]ll licensed healthcare facilities are required to have policies in place implementing protections of patient rights and to treat partners in a civil union as spouses in a marriage.²⁵

Another witness aptly summed up the problem with civil unions:

In times of crisis, it is unfair and unreasonable to ask people in a state licensed relationship to have to explain that relationship [civil union relationship]; to explain why they are legally entitled to hospital visitation rights, to explain why they are legally entitled to make final arrangements for their deceased spouse. Yet, as a practical matter, civil unions impose this unreasonable burden.²⁶

C. Civil unions perpetuate psychological harm.

Since the interim report, the Commission has heard testimony from mental health experts. They described the deep psychological harm that civil union laws can inflict on LGBT youth, as well as on straight youth being raised in same-sex families. The Commission also heard from affected youth themselves.

Marshall Forstein, M.D., an associate professor of psychiatry at Harvard University Medical School and a Distinguished Fellow of the American Psychiatric Association, told the Commission:

For young people coming out, which is about 5 to 15 percent of the overall U.S. population, the presence of role models who have equal status via marriage in society has significant meaning both internally and socially and has potential for reducing their isolation [and] sense of stigma that gay teens face in their everyday lives. And I point out here the data on suicide among gay and lesbian teens which is about three times that of the general teenage population.

Same-sex marriages provide stability for couples in terms of public acknowledgment of their commitment and provide legitimacy for the children being raised by gay and lesbian parents.

* * *

The socially sanctioned right of gay marriage which is qualitatively different than civil unions, the right to choose one's spouse, has a positive impact on self-esteem, sense of being validated in the eyes of the community, and on the internalization of ideas of commitment and responsibility to others, something that is sorely needed in our society currently.

* * *

Nothing is more basic from a mental health perspective to happiness and liberty than the right to love another human being with the same privileges and responsibilities as everyone else.²⁷

Judith Glassgold, Psy.D. is President of the New Jersey Psychological Association and a licensed psychologist who has provided psychotherapy to children, adolescents and their families, including same-sex individuals and families, for 17 years. She is a faculty member at the Graduate School of Applied and Professional Psychology at Rutgers University, and a past president of the Society for the Psychological Study of Lesbian, Gay and Bisexual Issues of the American Psychological Association. Dr. Glassgold testified before the Commission:

Children of same-sex relationships must cope with the stigma of being in a family without the social recognition that exists through marriage. Children of same-sex relationships are the secondary target of the stigma directed at their parents because of their parents' sexual orientation. Such stigma may be indirect such as the strain due to lack of social support and acceptance. Also, some children may be targeted due to teasing in school or from peers.

Further, although the children from civil unions are legally legitimate, children born into these relationships are born outside of marriage and still may be faced with the stigma of illegitimacy in the eyes of their peers.

* * *

Civil unions can be perceived as society's judgment that committed intimate relationships with people of the same sex are inherently different and potentially inferior to heterosexual relationships, and that the participants in the same-sex marriage are inherently less deserving than heterosexual couples of society's full recognition.

As a result of the lack of marriage equality, both lesbian, gay and bisexual adolescents and children of same-sex relationships face continued stigma. The stigma has negative mental health effects. Children of same-sex families and lesbian, gay and bisexual adolescents would benefit from their reduction of the stigma and having any future threat of discrimination and stigma removed from their lives.²⁸

Meredith Fenton is national program director of Children of Lesbians and Gays Everywhere (COLAGE) and is herself the daughter of a lesbian parent. She told the Commission:

Many youth we work with have reported that one of the common ways that they have been teased by other kids is that kids have questioned the validity of their families because their parents aren't able to get married. Young people often equate the notion of a real family with the idea of a family that has married parents. A recent study that COLAGE co-published with GLSEN (the Gay, Lesbian, and Straight Education Network) showed that around 43 percent of students with one or more LGBT parents experienced verbal harassment from their peers in their schools on a regular basis. And denying families marriage equality merely gives more fodder to those bullies who can say, "Your family is not a real family, your parents can't get married."

We also find youth in COLAGE who report that hearing that their family can't have the same rights as other families leads them to feeling scared or confused when they hear that folks are against their families being married. They say that they think somebody is going to come and break up their family. Youth have also shared that they're confused about the idea of civil unions and why there needs to be this separate category for their family.²⁹

Caitlin, a college student who grew up in Northwestern New Jersey, told the Commission:

When...my father came out of the closet...that changed a lot of things. Shortly thereafter he found his life partner...who is a second father to me and who I love very much and who my entire family loves....I was very proud of my father for finally finding his voice and being able to be true to himself.

* * *

If the law says that someone is equal, people are going to recognize it. And if the law is not willing to say that, why should the common person out on the street, in the schools, the teacher, students, recognize that family as being the same?

So the State of New Jersey sent me a very clear message that while my old family was great and fabulous and wonderful, my new family was second rate. And it was really, really difficult for me ...because I grew up in an area where there wasn't a lot of diversity and I really needed someone to affirm me, and unfortunately the state failed me in that.³⁰

Miriam, a 16-year-old from central New Jersey with two moms, testified:

High school is definitely difficult for anyone, but it's really difficult for someone who stands out as much as I do, especially in this town where everyone is so similar. And people still come up to me sometimes and be like, "Oh, are you the girl, you have two moms, right?"...And now since they had a civil union a year ago, which, you know, was nice, it was a nice ceremony, it was beautiful, but I kind of had to explain to people, to my friends,...my parents are...having a wedding but they're not getting married, they're having a civil union. I would say maybe like 0.01 percent of high schoolers know what a civil union is. Like, no one knows what that is. So I have to...explain that.³¹

These are only a few of the first-hand stories the Commission heard from young people being raised by same-sex couples.

Among the most poignant testimony this Commission has heard since issuing its first interim report has been the stories of LGBT youth. They described the pain they have suffered because of the stigma associated with their not being able to envision marriage in their future.

Ashley, a high school student in Essex County, testified:

Today (a classmate) asked me, "Do you have a boyfriend?" I said, "No, actually, I have a girlfriend. You might know her." And he said, "You have a girlfriend? That's wrong, that's a disease. You need to go get help for that." And I was like, "Why is it a disease?" And he was like, "You

can't get married. Well, that's why, you can't get married. Obviously something is wrong with it."³²

Tom, a 17-year old gay teen from Essex County, testified before the Commission about what the difference between civil unions and marriage means to him:

[B]esides the obvious legality issues, [civil union is] a separate word. It's totally different. It's like if my two brothers can be married and have their relationship with their...wife be called a marriage and I can't that puts me in a second-class citizen state which I never want to be in, which I currently am in right now but I am desperately trying to get out of.

* * *

I'm just tired of having my future be in jeopardy because certain people don't feel comfortable giving equal rights to gays and lesbians alike. And I'm not really sure what to say, but it's just the emotional damage that's been done by knowing that it's not – that I don't have the equal rights that both my brothers have,...[i]t's just a confusing situation to be in, and the more I think about it, the more angry I get, the more confused and upset.

* * *

I want to be able to, in the future, talk to my brothers and say, "Nick, you have a wife, you love her very much. David, you have a wife, you love her very much. But I have a husband and I love him too."... Even if I'm allowed to have marriage now, which would be an amazing thing, the damage that's been done since I was really little to now, I don't think it can ever be undone. But being able to be married now would be such an amazing feeling, to know that some time in my life I can be equal to everyone I know, to both my brothers and all my friends that I have.³³

Finally, the Act also has an adverse psychological impact on couples where one of the partners is transgender. The Commission affirms its finding from the interim report that the classification of civil union may place marital status in question for these couples. These couples, who were married legally in New Jersey, now find themselves questioning how their relationships will be labeled in light of the Act.

Heather Shulack, a male to female transgender individual, who has been married to Karen for over 20 years, testified:

The most important fact that I would like to bring to your [at]tention is how our lives have impacted our sons....[I]f the civil union legislation

evolved into same-sex marriage equality there would be less of a stigma on our family structure. Basically the state would in effect legitimize our family structure.³⁴

Denise and Fran Brunner, who have been married for 28 years and who have three children, reported that they feel as if they are in legal limbo and are concerned that they could be relegated to second class status if their marriage is deemed a civil union.³⁵ They fear that separately labeling their relationship would negatively affect their children by sending the message that their parents are something less than a legally married couple.

Audrey and Robin Bazlin-Weglarz also fear that the legality of their marriage could be subject to challenge some day. Robin noted that their relationship did not change because of the surgery; they still feel the same love for one another they always did.³⁶ They, too, are concerned that their marriage may be viewed as a civil union because of the perception that civil unions are not equivalent to marriages.

D. A marriage law would make a positive impact.

The Commission must “evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage.” Inherent in that charge is the need to examine whether a marriage law would remedy the shortcomings of the Civil Union Act.

The Commission concludes that a marriage law would provide that remedy, despite the existence of a federal prohibition on the recognition of same-sex relationships.

As the Commission reported in its interim report, the marriage law in Massachusetts has led many employers in that state to ignore the ERISA loophole and provide equal benefits to same-sex wives or husbands. The Massachusetts experience dispels any notion that so long as federal law does not recognize same-sex relationships, it would make no difference whether a particular state uses the term “marriage” or “civil union” to describe a same-sex couple’s relationship. In fact, the word “marriage” can and does make a difference to employers, even within the constraints of federal law.

Tom Barbera, a Massachusetts labor leader who works for the Service Employees International Union and served as Vice President of the Massachusetts AFL-CIO, told the Commission:

From the immediate weeks after May 17, 2004, when marriage equality took effect in Massachusetts, right on through today, ERISA has barely been an issue in Massachusetts.... In the first weeks of marriage equality,

only a few companies chose not to provide retirement benefits under ERISA to same-sex married couples.

* * *

It is not that ERISA-covered employers in Massachusetts don't understand that federal law allows them to refrain from providing benefits to same-sex married couples. It's that employers also understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination. Employers would have to acknowledge that they are discriminating against their employees because they are lesbian or gay. And employers in a progressive state like Massachusetts are loathe to do that, as they would be in a similarly progressive state like New Jersey were you to enact a marriage equality law.

Therefore, the existence of ERISA makes it all the more important to change the nomenclature of civil unions to marriage. As we've seen time and again in Massachusetts, the word 'marriage' has great persuasive weight in getting companies to offer benefits notwithstanding ERISA.³⁷

Lee Swislow and Gary Buseck, respectively the executive director and legal director of Gay and Lesbian Advocates and Defenders (GLAD), the legal organization serving the LGBT community across New England, describe how the word "marriage" places a heavy burden on employers thinking of invoking ERISA, which the term "civil union" does not. As Swislow and Buseck wrote to this Commission:

A company that makes coverage available to the spouses of heterosexual employees has to depart from its general rule covering married employees and draw a new line of discrimination in order to deny benefits to some married employees but not others. There are a number of companies that have been unwilling to draw that line of discrimination and do, indeed, provide the same benefits to both their same-sex and opposite-sex married employees.³⁸

After issuing its interim report on February 19, 2008, this Commission heard more testimony from same-sex couples in Massachusetts - and their children - on the extraordinary psychological benefit of the couples' being able to marry.

Laura Patey and Leigh Powers, a married couple in Massachusetts, are the mothers of two children who were adopted at age 11. Both children had been placed for adoption and returned, suffering heartbreaking loss before Patey and Powers adopted them into a secure home. The story of these children is not

dissimilar to those of children being raised by same-sex parents in New Jersey, a pioneer in allowing same-sex couples to adopt.

Laura Patey, who grew up in New Jersey, told this Commission:

After our civil marriage, you know, I'd be in the car with Alex and he'd say, "You know what?" And I'd say, "What?" And he'd go, "You're married." And it would just come up for weeks. He'd say, "You know what? You're married." It was a big deal. It was always in the forefront of his thinking...You know, kids who have not had family, haven't had that sort of connection and real understanding, attachment issues are huge. And a sense of validation of being part of a real family.³⁹

Leigh Powers added:

I cannot tell you the impact that 15 minutes and the marriage license had on our two young guys....Don't misunderstand me but I think it almost meant more to them in some ways because our commitment had been solidified through our church service and through our life together for 16 years. But to them it made all the difference in the world. And for at least two, three, four weeks later we would get teased about finally not living in sin any longer, so it was such a profound impact.⁴⁰

Raised by his moms Susan Shepherd and Marsha Hams in Massachusetts, Peter Hams-Shepherd went on to become a hockey star in high school and college. He testified before the Commission:

[A]s a kid, if your parents are different,...you don't want to talk about your family....I was very guarded with my friends, my teammates, my coaches....When they don't understand what your parents are, that puts you in a scary situation as a kid, because kids are extremely mean to each other and that's just the way kids are...[I]t put huge pressure on me....I was afraid to ask my teammates or friends to stay at the house because I was afraid that they would see that my parents have one ... bedroom, but I was also afraid that my coach would either cut me from the team or bench me, and that was something that happened all the way up until my parents got married.

Every time I let somebody in and I said, "Hey, I have to tell you something," I'd say, "My parents are gay," and no matter what they said, my next reaction was, "Don't tell anybody." And that's no way to grow up.

After my parents got their marriage license, all that changed. For the first time in my life I could stand there and I had a word to describe my family and that word could describe it to everybody because everybody

already knew what a marriage was. You know, they didn't have to question.

It's been the biggest thing in my life. You know, I can't stop talking about my parents. It's easier for me to go around and talk to friends that I've had for 20 years, to go up to them and speak about my family openly now and they get it. When you say that your family is married, they just get it and there's not a question. I just wish it would have happened when I was little, so I didn't have to go through all this stuff.

It was just the best feeling I ever had. And part of it, too, I think was I felt like finally I was protected. My parents' fears probably creeped into my subconscious mind too as a kid, that they would lose me for some reason.

I've watched young gay couples, teenagers, 15 year olds, walk up to my parents and say, "You guys are heroes." And you can see in their eyes that finally there's hope that their relationship is just as good as anybody else's. There's a future in their relationship. I was happy for every other little kid out there, that they didn't have to go through the same stuff.

I see the huge weight lifted off my parents' shoulders. When they talk to their co-workers at work or their boss, it's huge. To not tell your lifelong friends or your boss for 20 years about your spouse, it's a tough thing to live with, and it's something that people shouldn't have to live with, especially the kids.⁴¹

Peter's parents also testified before the Commission. In contrast to civil union couples in New Jersey who have struggled for acceptance at hospitals and for equality in the workplace, this Massachusetts couple told the Commission a different story.

Marsha Hams testified:

If you have a car crash and you end up in a hospital you don't know, or an ER, you know you're going to be treated like anybody else, and that's a huge relief.⁴²

Susan Shepherd added:

I do health and safety work with...big construction unions. I went down to the labor training center a few weeks after [we got married]....All these big burly guys come and say, "Well, I guess we should say congratulations, huh?" And I'm like, "Oh, oh, yeah. Thanks." Then another guy walks in and says, "How does it feel to be married

now? How's married life?" You know, because that's what people understand....What are they going to say, "How is your partner? How is your... No. My wife." And they get it.⁴³

Contrast this with the testimony before the Commission by civil union couples in New Jersey, who report they have had to explain their status repeatedly to employers, doctors, nurses, insurers, and teachers, among so many others.

One partner in a civil union couple in New Jersey showed the Commissioners a "flash drive" that both he and his partner keep on key chains. The flash drives contain living wills, advanced health care directives, and powers of attorney for the couple, as they fear being unable to adequately explain their relationship to emergency room personnel during a medical crisis. The witness testified that opposite-sex married couples need not live with this uncertainty because a mere declaration that someone is the "wife," "husband," or "spouse" of someone who is ill will provide immediate access and decision-making rights.

Most New Jersey civil union couples who testified about difficulties in having their rights recognized told the Commission that they believe they would not have encountered the same level of resistance, or any resistance at all, had they been able to identify themselves as married. As the Commission noted in its interim report, they called the separate system created by the Act "an invitation to discriminate" and a "justification to employers and others" to treat same-sex couples as "less than" married couples. Several witnesses offered their view that relatives, medical caregivers, and individuals in positions of authority take cues from the government's decision to categorize same-sex couples differently.

This testimony demonstrates that the civil union law has resulted in economic, medical and psychological harm for a number of same-sex couples and their children. This Commission believes that as long as New Jersey maintains two separate systems to recognize the unions of same-sex couples and opposite-sex couples, same-sex couples and their children will face a challenge in receiving equal treatment. Under a dual system, these and future families will suffer economic, medical and psychological harm.

The Commission finds that even if all employers in New Jersey were suddenly to provide benefits to employees in civil unions equal to the benefits provided to married employees - an unlikely proposition in itself - such compliance would not cure much of the inequality perpetuated by the civil union law.

Further, even if some employers were to continue to invoke the federal ERISA loophole under a prospective marriage statute - notwithstanding the evidence from Massachusetts that fewer employers would invoke that loophole - a marriage statute would cure much of the harm perpetuated by the existing civil union law as reflected in the collected testimony.

III.

FISCAL IMPACT OF CIVIL UNIONS VS. MARRIAGE

The Legislature tasked the Commission to “evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage.”⁴⁴ To this end, the Commission heard considerable testimony about the financial impact of the civil union law on the State as well as the potential fiscal impact of marriage.

A. Studies suggest that marriage would enhance the State’s revenues and economy.

The Commission reviewed testimony about the impact marriage would have on the State budget. A Williams Institute⁴⁵ study of the impact of marriage for same-sex couples on New Jersey’s economy and a study by the New York City Comptroller’s Office suggest that the introduction of marriage would likely result in increased revenue to the State and would have a positive impact on the State’s economy, primarily through increased tourism.

The Williams Institute studied the impact of marriage on New Jersey’s budget, and Professor Brad Sears, J.D., Executive Director of the Institute and an Adjunct Professor of Law at UCLA Law School testified about the report’s findings.⁴⁶ The Institute conservatively concluded that extending marriage to same-sex couples could boost New Jersey state and local government revenues by approximately \$19 million over the next three years.⁴⁷ In addition, spending on weddings and tourism could boost the New Jersey economy by approximately \$248 million over three years and create or sustain over 800 new jobs.⁴⁸

The Institute relied on a number of variables in calculating the figures. First, based upon U.S. Census Bureau data and the experience of Massachusetts and other states, the Institute estimates that approximately one half, or 10,589, of New Jersey’s same-sex couples would marry over the next three years.⁴⁹ Second, based upon a number of assumptions including tourism data and the recognition of same-sex marriage by other jurisdictions, the Institute also estimates that 45,831 same-sex couples from other states would travel to New Jersey to marry.⁵⁰ Almost half of those couples would come from New York.⁵¹ Third, the Institute conservatively estimated that both in-state and out-of-state couples would spend less than the average cost of a wedding.⁵²

As noted, marriage could increase government revenue by almost \$19 million. These revenues are comprised of \$17.3 million in local sales taxes and occupancy fees and \$1.6 million in marriage license fees.⁵³ Notably, \$25 of each marriage license fee is designated for domestic violence programs in New Jersey.⁵⁴ While some fee revenue will be offset by costs of processing additional marriage licenses, it will be minimal given the experiences in other states, and New Jersey's own Fiscal Estimate of the impact of civil unions which also require a license.⁵⁵

The Institute also identified other potential revenues that could not be easily quantified, including increases in motor fuels tax, excise tax on alcoholic beverages, property tax revenues or increased earnings taxes.⁵⁶

Mr. Sears testified that the positive fiscal impact of marriage to New Jersey will diminish as more states ratify marriage, and Massachusetts abolishes the law preventing non-residents from marrying there.⁵⁷

The Comptroller for New York City conducted a similar study of the financial impact marriage would have on both the City's and New York State's economy.⁵⁸ Marcia Van Wagner, Deputy Comptroller for Fiscal & Budget Studies, appeared before the Commission to testify about the findings.⁵⁹ The Comptroller conservatively estimated that marriage would add a net of \$142 million to the City's economy during the three years after enactment and \$184 million to the State's economy over the same period.⁶⁰ The City's figures consisted of \$175 million in revenues from weddings less \$33 million from increased costs for employee health insurance within the State.⁶¹ The State's figures were comprised of \$247 million in revenue from weddings minus \$63 million in increased health insurance costs.⁶² Significantly, the Comptroller estimated that New Jersey residents crossing the border would generate revenue of over \$30 million in New York State and over \$17 million New York City.⁶³ The Commission believes that much of that revenue would remain in New Jersey if marriage were enacted in both states.

Over the first three years after enactment, the net fiscal benefit to New York State was estimated at \$117.6 million and the fiscal benefit to the City for the same period was \$6.9 million.⁶⁴ The positive fiscal impact on the State resulted from increased sales and hotel occupancy taxes, increased personal income taxes⁶⁵ and savings from certain publicly funded health programs.⁶⁶ The positive impact on the City derives from increased sales and hotel occupancy taxes and marriage licensing fees.⁶⁷

The Commission also heard testimony that marriage would make New Jersey attractive to same- sex couples and others who are looking for a progressive environment in which to live. The New York Comptroller noted a number of salutary financial benefits ranging from positive impacts on businesses which may face lower recruiting costs or an expanded pool of qualified job applicants⁶⁸

or increases in home purchases leading to more tax revenue.⁶⁹ The Comptroller testified that changes in behavior with regard to home ownership could lead to increased real estate taxes of as much as \$40 million over a multi-year period.⁷⁰

Similarly, Marc Solomon, Executive Director of MassEquality, testified to the positive economic impact of marriage on Massachusetts because same-sex couples are moving there and bringing their talents and financial contributions.⁷¹ Martha Livingston, founder and CEO of Inclusive Recruitment, LLC, a Boston-based staffing firm that places LGBT professionals in workplaces, confirmed this observation. She testified that she has observed LGBT professionals moving to Massachusetts, contributing to the community and bringing their expectations, credentials, children, parents and money - for the culture of acceptance.⁷² She has further found that companies have been “rolling out the red carpet” to the LGBT community in terms of recruitment practices.⁷³ She also noted that marriage in Massachusetts is not only appealing to the gay community but also to all who want to live in an inclusive and accepting environment.⁷⁴ Allison Kemper, a Graduate Student in the University of Toronto Business School, echoed this view. She noted that attracting the best and the brightest is accomplished in part by a positive living environment, and a place where human rights are respected will draw not only the gay community but those who want a happy and respectful place to live.⁷⁵

The Boston Business Journal wrote of the Massachusetts experience that “some observers see the influx of same-sex couples as a boon for the state’s economy,” and a “trend that runs counter to the talent drain” particularly in light of Massachusetts’ “dubious reputation for losing talented workers to less pricey markets.”⁷⁶

B. Marriage would not result in increased costs to the State.

After the Civil Union bill was introduced, the Office of Legislative Services estimated that the state and local costs associated with the new law would be minimal “as similar functions are currently being undertaken.”⁷⁷ The State Departments testifying before the Commission unanimously confirmed that the implementation of the Civil Union Act has resulted in minimal costs to the State. Most of the costs have been associated with changes in forms, programming and training on the law.⁷⁸

Moreover, the State government’s implementation of the Act has gone smoothly. David Anderson of the Administrative Office of the Courts noted that the Judiciary’s implementation of the Civil Union Act has been “seamless.”⁷⁹ Ronald Marino, Director of Unemployment Insurance for the Department of Labor & Workforce Development cited a smooth transition of civil unions into the normal flow of the Department’s business.⁸⁰ Maureen Adams, Director of the Division of Taxation, echoed these comments, noting a smooth transition.⁸¹

However, one Commissioner noted that, more than a year after the effective date of the Act, the State Ethics Commission had not changed its financial disclosure forms to include civil union as an option.⁸² This, however, appears to be an isolated problem. None of the State Departments testifying received any complaints relating to the State's implementation of the Act.⁸³ Further, none of the verified complaints received by the Division on Civil Rights relates to State government operations, and advocacy groups received few complaints emanating from government's implementation of the Act.⁸⁴

Because the Act grants same-sex couples "all of the same benefits, protections and responsibilities" as "are granted to spouses in a marriage," the Departments testified that enactment of marriage would result in little or no financial impact on the State.⁸⁵ Indeed, marriage may lead to reduced costs in some instances. Joseph A. Komosinski, the State Registrar of Vital Statistics, testified that money would be saved because there would be no need to print alternative forms, and there would be one standard procedure for the Bureau of Vital Statistics.⁸⁶ Dr. Gabel-Brett noted:

In these financial times, ... why or how can we waste state money, taxpayers' money, making forms, making changes, making a separate structure that has to be administered, for no other purpose than to set people apart?....

Every time you change a state program, whatever it might be, some benefit, some program, some eligibility requirement, you are going to have to change it in two parallel structures. You are going to have to spend more time sending out notices, changing websites, changing computer forms. So it is not going to end."⁸⁷

The Commission concludes that the civil union law has had minimal negative impact on the operations of state government. Most agencies expended time and resources dedicated to civil unions within the first few months after enactment. Since then, there have been few new costs associated with the Act. The testimony suggests that implementation of the civil union law by state government was timely and efficient. Overall, agencies are fulfilling their obligations under the Act, and civil union couples are being provided the benefits and protections afforded by State programs.

The State would have little, if any, cost associated with the enactment of marriage, as any such costs would already have been realized as a result of the implementation of the Civil Union Act.

C. Civil Unions and Federal impediments to equality.

As noted previously in this report, the Commission finds that a marriage law in New Jersey would make a significant difference in providing equality and dignity

to same-sex couples and their children. Even if federal law fails to recognize same-sex relationships as marriage, the Commission finds that a marriage law in New Jersey would help to alleviate the disparate treatment of same-sex couples, including denial of benefits, as testimony to the Commission has shown to be the case in Massachusetts. However, it is worth reviewing what federal impediments do exist in providing equality to same-sex couples in New Jersey.

Federal DOMA continues to obstruct access to equal financial benefits of marriage for civil union couples, and would continue to do so even if New Jersey were to enact marriage. There are over 1,000 federal rights and benefits of marriage that civil union couples cannot enjoy because of DOMA, which defines marriage for purposes of federal law as the union between one man and one woman.⁸⁸ As noted in the Commission's first report, DOMA permits employers to discriminate against same-sex couples in the provision of health insurance benefits. Moreover, the Commission has heard testimony that DOMA precludes federal reimbursement for certain federally subsidized programs such as Medicaid,⁸⁹ and it may impact the amount of financial aid for which a child of a same-sex couple qualifies.

The Commission heard from the Department of Human Services concerning two federally funded programs - Medicaid and public entitlements - which may be impacted by the recognition of government sanctioned same-sex relationships.

Medicaid is a federal program funded jointly by the federal government and the State. In the context of Medicaid, because DOMA controls the definition of "spouse," "husband" and "wife" as these terms are used in federal laws and because federal law does not recognize state-sanctioned same-sex relationships like civil unions, the State Medicaid program cannot claim federal funds for civil union couples, nor could it do so for same-sex married couples so long as DOMA exists.⁹⁰

Currently, Medicaid eligibility for couples in civil unions is based upon each individual's eligibility including a consideration of any jointly held assets.⁹¹ Pursuant to written guidance given to Vermont by the Centers for Medicare and Medicaid Services (CMS), New Jersey has two options.⁹² The State may (1) establish a separate state-financed and administered program for which federal funds cannot be used, or (2) elect to apply its Civil Union statute in the context of its Medicaid program so long as it separately identifies any service and administrative expenditures that result from the difference between its definition of spouse from the DOMA definition and does not submit any claims for federal funds for those expenditures. For New Jersey to choose the first option, the State's Medicaid law would have to be changed to create a state-only funded program for these couples.⁹³ The Department has not prepared an analysis of

the fiscal impact of such a program.⁹⁴ The second option would also require statutory changes. Both options would require a budgetary analysis.⁹⁵

The Department also evaluated the impact on public entitlements such as Temporary Assistance to Needy Families (TANF), General Assistance (GA), food stamps and child support. The Civil Union Act did not have a major financial impact in those areas.⁹⁶ In the TANF, GA and food stamp programs, eligibility is determined by household income.⁹⁷ Thus, a couple's civil union or marital status is irrelevant for purposes of determining eligibility. Some aspects of the child support program may be affected by DOMA's definition of spouse, and the Department is seeking guidance from the federal Department of Health and Human Services.⁹⁸

The Commission also heard testimony from the New Jersey Commission on Higher Education and the Higher Education Student Assistance Authority (HESAA) concerning the impact of civil unions on student financial aid. Eligibility for federal and state student financial aid is determined through the FAFSA form, which, because it is a federal form, does not recognize civil union status.⁹⁹ While there is no federal law requiring the use of the FAFSA, the creation and implementation of a parallel State system for student aid applicants would cost between \$5-10 million annually, including creation of a database and infrastructure, printing and mailing costs, additional staff salary/benefits, and leasing additional workspace.¹⁰⁰ Currently, the state receives results of the FAFSA processed by the federal government which the State then uses to implement its own student aid program.¹⁰¹ Michael Angulo, Executive Director of HESAA testified: "The reason why it [aid application process] became centralized through the federal form is, number one, because the federal database could be checked against the IRS database, but also because it's a uniform process nationally. Each state used to have a dual system and that was extremely burdensome on families, on the kids filling out those forms."¹⁰² Mr. Angulo noted that \$265 million in State-funded grants and loans is apportioned based upon the FAFSA data which is problematic because it does not take civil union status into account.¹⁰³ Thus, State funds are not available to children of civil union couples on the same basis as married couples. Either a change to the FAFSA form to recognize same-sex relationships or a parallel State financial aid process with accompanying costs would rectify the situation.

Consequently, in this regard the Commission finds the State in noncompliance with the Civil Union Act. Mr. Angulo noted that this is so because the costs that would be incurred if the State were to implement any alternative application system have not been budgeted. It should also be noted that for the State to be in compliance regarding financial aid to students would require additional expenditures regardless of the extension of marriage.

The lack of recognition of a couple's civil union status could have either a positive or negative impact on a child's eligibility for student aid. It may be

positive if the parents' incomes are not considered jointly. For example, if both parents work, the student can list the parent with the lower income and thus potentially qualify for higher loan amounts.¹⁰⁴ The effect may be negative if one partner's financial dependency on the other partner is not considered for eligibility.¹⁰⁵ Lacking that dependent status, they may not qualify for unsubsidized loans, or in some cases grants.¹⁰⁶ The problem with regard to student aid is one that is also encountered in Massachusetts, because of DOMA, despite marriage.¹⁰⁷ Delegations from New Jersey, Vermont and Massachusetts are working to change the FAFSA form to correct the problem.¹⁰⁸

DOMA also impacts civil union couples in the area of taxation. Often, these couples are burdened with additional expenses and time spent preparing extra paperwork to complete their tax forms.¹⁰⁹ One such example is in the area of earned income tax credits. Because same-sex couples are ineligible for a federal earned income tax credit (EITC) and eligibility for New Jersey's EITC is calculated upon one's eligibility for the federal EITC, civil union couples are required to prepare a federal worksheet and apply those calculations to state filings.¹¹⁰ These additional steps result in couples' having to shoulder costs beyond those borne by married couples.

Civil union couples also face an unequal tax burden associated with their receipt of employee health benefits. A Williams Institute study issued in December 2007 estimated that same-sex couples who are in same-sex domestic partnerships (or in New Jersey's case, civil unions), lose \$178 million per year to additional taxes and that employers who offer benefits to employees' domestic or civil union partners pay an additional \$57 million per year in additional payroll taxes because of this unequal tax treatment.¹¹¹ The reason for this inequality for partners is that the Internal Revenue Code treats the value of the benefits as taxable or "imputed" income to the employee, unless the partner qualifies as a dependent of the employee.¹¹² Employers who offer equal benefits to same-sex couples must also pay taxes on this imputed income for their share of the employee's payroll tax while benefits for an employee's spouse are not considered taxable income regardless of the dependence or independence of the spouse.¹¹³ Another tax disadvantage is that employees cannot use pre-tax dollars to pay for a partner's coverage.¹¹⁴

Given the non-recognition by federal law and by the laws of many states, the marriage of a New Jersey same-sex couple could share many of the financial inadequacies of a civil union. However, the Commission believes that such a change in the law could afford LGBT couples the less tangible, but nonetheless fundamental, benefits of marriage, including its social, historical and cultural recognition and its powerful nomenclature. As discussed earlier in this report, the use of the term marriage could also enhance recognition of the underlying legal consequences of the relationship especially in times of crisis. Further, the State's amendment of the marriage laws to provide access to civil marriage for

same-sex couples would be an unequivocal and affirmative recognition of equality because it would depart from maintaining a separate scheme that singles people out based upon their sexual orientation.

Finally, even in the event that DOMA is repealed, civil unions would still not be recognized, since the term civil union appears nowhere in federal law.

IV. RECOGNITION AND TREATMENT OF CIVIL UNIONS BY OTHER STATES AND JURISDICTIONS

The Legislature directed the Commission to collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution.¹¹⁵ The New Jersey Legislature defined the term “civil union” to be the “legally recognized union of two eligible individuals of the same sex” who “receive the same benefits and protections and are subject to the same responsibilities as spouses in a marriage.”¹¹⁶ Consequently, the Commission has surveyed government-sanctioned relationships from states and foreign jurisdictions which provide all of the rights and obligations of marriage. Five states besides New Jersey have created legal relationships available to same-sex couples which propose to be the equivalent of marriage.

A. Vermont

Vermont enacted its civil union law in 2000.¹¹⁷ Parties to a civil union in Vermont are intended to enjoy all the same benefits, protections and responsibilities under Vermont law as are granted to spouses in a marriage. Under the law, civil union partners are intended to have equal access to state separation, divorce, child custody, child support and property division laws if the civil union ends. Civil unions can be dissolved in Vermont family court in exactly the same manner as divorce of married couples.

The Commission heard testimony that even eight years after enactment, Vermont’s Civil Union Law has not resulted in true equality although it purports to provide protections equal to marriage.¹¹⁸ “Time cannot and does not mend the inequality inherent in the two separate institutions.”¹¹⁹ On July 24, 2007, House and Senate leaders in the Vermont State Legislature announced the creation of the Vermont Commission on Family Recognition and Protection 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 Vermont Commission issued its report in April 2008.¹²⁰ Many of their findings mirror those of this Commission.

B. California

In 1999, California created domestic partnerships, which provided only a handful of rights to same-sex couples (as well as to opposite-sex couples in which one or both parties were at least 62 years of age). Effective in 2005, the California Legislature expanded the scope of the law to afford domestic partners all of the same rights, privileges and responsibilities as spouses under state law.¹²¹ In most cases, a domestic partnership must be dissolved through filing a court action identical to an action for dissolution of marriage.¹²²

On May 15, 2008, the Supreme Court of California ruled in a 4-3 decision that California's law limiting marriage to opposite-sex couples violates the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying.¹²³ The Court ruled that laws directed at sexual orientation are subject to strict judicial scrutiny and that marriage is a fundamental right under Article 1, Section 7 of the California Constitution, thereby striking down as unconstitutional the previously existing legislative ban on same-sex marriage embodied in two statutes, one enacted by the Legislature in 1977, and the other through the initiative process in 2000.

Considering whether the separate institution of domestic partnerships passed constitutional muster, the Court recognized that:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.¹²⁴

Assessing the favorable impact of the institution of marriage on the children of same-sex couples, the Court noted:

[T]he institution of civil marriage affords official governmental sanction and sanctuary to the family unit, granting a parent the ability to afford his or her children the substantial benefits that flow from a stable two-parent family environment, a ready and public means of establishing to others the legal basis of one's parental relationship to one's children, and the additional security that comes from the knowledge that his or her parental relationship with a child will

be afforded protection by the government against the adverse actions or claims of others. (Citation omitted).¹²⁵

The Court also recognized the intangible and powerful meaning of the term marriage:

[B]ecause of the long and celebrated history of the term ‘marriage’ and the widespread understanding that this term describes a union unreservedly approved and favored by the community, there clearly is a considerable and undeniable symbolic importance to this designation. Thus, it is apparent that affording access to this designation exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples.¹²⁶

Finally, citing this Commission’s first interim report, the Court recognized that the fundamental infirmity of the domestic partnership law was in the lack of a universally understood meaning of the term applied to the relationship:

[A]lthough the meaning of the term ‘marriage’ is well understood by the public generally, the status of domestic partnership is not. While it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term ‘domestic partnership’ is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.¹²⁷

On November 4, 2008, a majority of California voters voted for passage of Proposition 8, which denies marriage for same-sex couples. As of the date of this report, the validity of Proposition 8 rests with the courts.

