

10-21-1988

# Report On Ballot Measure 8 Revokes Ban on Sexual Orientation Discrimination in State Executive Branch

City Club of Portland (Portland, Or.)

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## Recommended Citation

City Club of Portland (Portland, Or.), "Report On Ballot Measure 8 Revokes Ban on Sexual Orientation Discrimination in State Executive Branch" (1988). *City Club of Portland*. 434.  
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Report On  
**Ballot Measure 8**  
**Revokes Ban on Sexual Orientation**  
**Discrimination in State Executive Branch**

Published in  
City Club of Portland Bulletin  
Vol. 69, No. 21  
October 21, 1988

The City Club membership will vote on this report on October 21, 1988. Until the membership vote, the City Club does not have an official position on this report. The outcome of the membership vote will be reported in the City Club Bulletin (Vol. 69, No. 23) dated November 4, 1988.

Report on  
**Ballot Measure 8**  
**"REVOKES BAN ON SEXUAL ORIENTATION**  
**DISCRIMINATION IN STATE EXECUTIVE BRANCH"**

To the Board of Governors,  
 City Club of Portland:

A year ago Governor Neil Goldschmidt signed an executive order which prohibits discrimination based on sexual orientation in state employment practices and in the provision of state services. Measure 8 would revoke that order.

The measure was placed on the ballot by initiative petition. Ballot language follows:

**Question:** Shall voters revoke Governor's authority to ban discrimination, based on sexual orientation, in state executive department employment and services?

**Explanation:** Enacts new law. Revokes Governor's order which bans discrimination, based on sexual orientation, both in executive branch employment and in carrying out executive branch duties within state government. Measure provides that no state official shall forbid taking personnel action against a state employee because of the employee's sexual orientation. Measure permits state officials to forbid taking personnel action against state employees based on non-job related factors. For the purposes of this measure, sexual orientation means heterosexuality, homosexuality, or bisexuality.

#### I. BACKGROUND

Discrimination against homosexuals has been the subject of study and argument in Oregon for a number of years. In the mid-1970s, Governor Bob Straub commissioned a task force to examine discrimination in state agencies. The task force recommended, among other things, that the Personnel Division adopt a policy of non-discrimination on the basis of sexual orientation. Similarly, in 1977 then Portland Mayor Neil Goldschmidt proposed an ordinance prohibiting employment discrimination by the City based on sexual orientation and declared a controversial "Gay Pride Day."

In 1977 the state legislature amended the state civil rights statutes, making it unlawful for employers to refuse to hire or employ an individual because of the sex of any

other person with whom that person associates. It is not clear whether the legislature intended these amendments as a ban on discrimination against homosexuals. The matter has not yet been tested in court.

During the 1986 gubernatorial election, both the Republican and the Democratic candidates endorsed protection of the civil rights of homosexuals. Shortly after the election, a coalition of religious and civic organizations proposed legislation which would have added "sexual orientation" to the list of protected classifications included in a variety of state civil rights statutes. The bill, HB 2325, attracted much attention and controversy in the 1987 Legislature. However, it died in committee.

Shortly after HB 2325 failed, some of the bill's supporters began lobbying the governor's office for an executive order which would prohibit discrimination in state agencies based on sexual orientation. On October 15, 1987, Governor Neil Goldschmidt signed EO-87-20. The full text of the Executive Order is as follows:

IT IS ORDERED AND DIRECTED:

1. No officer, employee or agency within the executive branch of state government shall discriminate on the basis of sexual orientation in the recruitment, hiring, classification, assignment, compensation, promotion, discipline, or termination of any employee.
2. No officer, employee or agency within the executive branch of state government shall, in carrying out the duties of state government, discriminate against any person on the basis of sexual orientation.
3. Nothing in this executive order shall require or authorize any affirmative action or preferential treatment of any person on the basis of sexual orientation.
4. This executive order does not apply:
  - a. To the legislative and judicial branches of state government.
  - b. To state officers and employees under the jurisdiction of an elected official other than the Governor.
  - c. To the Oregon National Guard, to the extent that the terms of this order would conflict with federal statutes, regulations or policies binding on the Guard.

- d. To any actions by correctional institutions prohibiting sexual conduct by inmates, or imposing discipline based on the violation of such a prohibition, or assigning inmates to single cells as necessary to prevent sexual conduct or while evaluating the inmates' propensity to engage in sexual conduct.
5. All agency heads are directed to make their personnel aware of the terms of this order, and to take steps to ensure that it is carried out. Each agency head shall report annually to the Governor on the steps taken pursuant to this paragraph.
6. For purposes of this executive order, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

Shortly after the signing of the Executive Order, the Oregon Citizens Alliance and the No Special Rights Committee prepared an initiative petition which would revoke the Governor's Executive Order. The text of the initiative is as follows:

SECTION 1. Executive Order No. EO-87-20 be, and hereby is, revoked.

SECTION 2. No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.

SECTION 3. This measure shall not be deemed to limit the authority of any state official to forbid generally the taking of personnel action against state employees based on nonjob related factors.

SECTION 4. For purposes of this measure, "sexual orientation" means heterosexuality, homosexuality or bisexuality.

SECTION 5. The various provisions of this measure are severable; therefore, if any provision of this measure be declared unconstitutional by any court of competent jurisdiction, the remaining provisions shall be unaffected by such declaration.

Proponents obtained the required number of signatures, and on July 22, 1988, the Secretary of State certified the initiative as Ballot Measure 8 on the November general election ballot.

## II. ARGUMENTS IN FAVOR

The following arguments were advanced by proponents of Ballot Measure 8:

1. There is no need for the Governor's Executive Order, as there has never been a single claim of employment discrimination based on sexual orientation in Oregon state government.
2. Homosexuals are already protected from employment discrimination, as are all Oregonians. State law provides that personnel decisions shall be made "without regard to non-job related factors." ORS 240.306. This includes "sexual orientation" as long as it remains a non-job related factor.
3. The Governor's Executive Order grants homosexual state employees special rights not enjoyed by other state employees. Homosexual employees could complain that otherwise legitimate job-related discipline actually represents discrimination based on sexual orientation, thus enabling them to lessen or completely escape needed discipline.
4. The Governor's Executive Order puts pressure on state agencies to hire more homosexuals. Section 5 requires state department heads to report annually steps taken to "carry out" the requirements of the order to eliminate discrimination against homosexuals. This will create pressure to keep track of the number of homosexual employees and hire more of them to comply with the Order.
5. The Governor's Executive Order is an inappropriate addition to civil rights laws. Traditionally, civil rights protection is based on "immutable characteristics" such as race or gender. Homosexuality can be changed and therefore is not entitled to special civil rights status.
6. The Governor's Executive Order attempts to force Oregonians to accept behavior that is immoral, unnatural, unhealthy and exploitative. Homosexuality is contrary to the family-oriented values of our nation. It encourages promiscuous sexuality, a self-centered morality and socially irresponsible behavior that exacts huge costs from society (for example, the AIDS epidemic). Oregonians have every right to discourage people from this behavior.
7. The homosexual community and its liberal allies view the Governor's Executive Order as only the first step toward an ultimate goal of total social acceptance by

society at large, a public acknowledgment that homosexuals have an alternate lifestyle that is as valid as that of any heterosexual and the same deference given to blacks, religious groups or women.

### III. ARGUMENTS IN OPPOSITION

The following arguments were advanced by opponents of Ballot Measure 8:

1. State government should provide services based on need and should hire, fire, promote or discipline based on talent, not on what a person does with his or her private life. The Governor's Executive Order does no more than reflect this principle of simple justice.
2. The Governor's Executive Order grants no "special privileges." It states clearly that it neither requires nor authorizes affirmative action. The Executive Order merely recognizes the right to privacy of Oregon's citizens, as well as the right to expect equal treatment under the law when private behavior does not affect the public.
3. The Governor's Executive Order is not unnecessary. According to the Oregon Supreme Court "it is possible to construe some Oregon statutes as prohibiting discrimination based on sexual orientation. But the scope of the pertinent statutes is not as broad as the language of EO-87-20, and the extent to which state and federal constitutions provide protection like that intended by EO-87-20 is unclear." ACLU of Oregon v. Roberts, No. SC S35060 (April 21, 1988) at 5.
4. Even if current law prohibits employment discrimination on the basis of sexual orientation, the fact remains that there is no existing protection against such discrimination in the provision of state services.
5. Discrimination based on sexual orientation does exist. If actual claims have not been filed, it is not surprising, given the social stigma that is often attached to homosexuality.
6. The Governor's Executive Order does not promote homosexuality. It takes no position on the issue at all. It simply states that, at least where decisions relating to government employment and government services are concerned, a person's sexual orientation is none of the state's business.
7. Ballot Measure 8 does not merely revoke the Governor's Executive Order. It affirmatively provides a license to discriminate. Section 2 of the measure states that

no state official can forbid the taking of personnel actions against any state employee based on that employee's sexual orientation.

#### IV. DISCUSSION

The focus of Ballot Measure 8 is the Governor's Executive Order prohibiting discrimination on the basis of sexual orientation. The Order itself is of limited applicability. It affects only agencies that report to the Governor, as opposed to other elected officials, such as the Secretary of State, the Treasurer or the Attorney General. It does not apply to the judiciary, the legislature or to local government, nor does it apply to any private business or individual.

The Order also is of limited scope. It prohibits discrimination based on sexual orientation. By its terms, it creates no special rights for homosexuals. It neither requires nor authorizes affirmative action based on sexual orientation. It merely precludes individuals from being hired, classified, compensated or fired or denied state services solely because of their sexual orientation.

No witness interviewed by your Committee objected to the Governor's Executive Order on the ground that state government agencies should be allowed to discriminate on the basis of sexual orientation. To the contrary, nearly all witnesses--both proponents and opponents of the ballot measure--agreed that individuals should not be fired from state employment or denied state services because of their private sexual preferences. Indeed, more than one proponent commented that the Governor's Executive Order itself is "unobjectionable."

The primary objections to the Executive Order related to its potential "symbolic" impact, the lack of any need for protection from discrimination and fears about potential adverse side effects of the order given the manner in which it has been drafted.

Proponents of Ballot Measure 8 argue that even though unobjectionable on its face, the Executive Order implicitly represents state sanction of homosexual behavior and helps prepare the way for homosexuals to obtain special privileges and to use public funds to promote their lifestyle. It is only in this context, argue proponents, that the real impact of the Governor's Executive Order can be evaluated.

There is nothing in the Executive Order itself that reflects approval or disapproval of homosexuality. There is nothing in the order that grants any special rights. There is nothing in the Order that mentions the use of public



funds to promote any particular lifestyle. That a particular group may in the future attempt to build upon the Executive Order to achieve some other objective is irrelevant to the issue before the voters.

Proponents of Ballot Measure 8 argue that there is no proof of discrimination on the basis of sexual orientation, that homosexuals are already protected under existing laws, and that traditional requirements for civil rights protection have not been satisfied.

Your Committee heard testimony that, in fact, discrimination based on sexual orientation does exist in state government, and that fear of reprisal accounts for the failure to make the discrimination public. Even were that not so, the lack of a past pattern of discrimination does not negate the validity of a policy stating that such discrimination should not exist, any more than the disappearance of racial discrimination claims would dictate the repeal of the Fourteenth Amendment.

It is true that some protections against discrimination exist already. Portions of the Oregon civil rights statutes may preclude discrimination on the basis of sexual orientation. However, the language of the law is unclear. As noted by the State Supreme Court, there is substantial uncertainty whether the law was intended to encompass discrimination on this basis. The law likewise prohibits employment discrimination based on so-called "non-job related factors." Nevertheless, existence of this law does not render the Executive Order meaningless. The Executive Order simply and explicitly defines what even the proponents concede, namely, that an individual's private sexual preferences constitutes such a "non-job related factor." Perhaps more important, the Executive Order is not limited to employment discrimination, but to discrimination in the provision of state services as well. There is no duplication of protection in this regard.

Whether homosexuality is a "changeable" behavior pattern is beyond the scope of your Committee's charge and information. Yet, even assuming this to be the case, it is not clear why this renders sexual orientation inappropriate for protection from discrimination. The laws and constitutions of our state and federal governments preclude a variety of changeable behavior patterns from being the basis for discrimination. Among them are an individual's religion, creed or political affiliation. Each of these is purely a matter of choice on the part of the individual. Each of these cannot be the basis of employment discrimination under existing civil rights laws. The supposed changeable nature of sexual preference therefore, provides no argument against the protection from discrimination afforded in the Executive Order.

Proponents of Ballot Measure 8 argue that there is a possibility that management may refrain from disciplinary action for fear of a discrimination claim. The argument is speculative. Moreover, were it to be taken seriously, employment discrimination laws of any sort would not exist. It also attributes to management a disciplinary timidity for which your Committee has heard no evidence.

Proponents of Ballot Measure 8 also contend that the Executive Order puts pressure on state agencies to hire more homosexuals to comply with the requirement that the agencies "take steps to ensure that [the Order] is carried out." Your Committee agrees that this language is not altogether clear. It is not certain, for example, how agencies are to determine whether discrimination on the basis of sexual orientation is occurring and how progress toward this goal is to be measured. What is clear, however, is that affirmative action is not the intention. The Executive Order expressly states the contrary to be the case. And a review of the Executive Department Annual Report Forms concerning the Order bears this out. The form requires information concerning how the agency has publicized the Executive Order, the avenues available in the agency to redress alleged discrimination, the steps taken to ensure that discrimination does not take place, and the number of discrimination claims filed in the previous year.

Aside from an evaluation of the Executive Order that Ballot Measure 8 seeks to revoke, there is also the matter of the wording of the measure itself. Section 2 is especially important. This section states that "No state official shall prohibit the taking of any personnel action against any state official based on sexual orientation."

It appears to your Committee that this section would do more than eliminate Executive Order 87-20. It would constitute an endorsement of discrimination based on sexual orientation. It is true that, in a strictly technical sense, a statement that something cannot be prohibited does not necessarily mean that it is endorsed. Nevertheless, your Committee is concerned that a plain reading of the measure would permit the very discrimination that even the measure's proponents oppose. Measure 8 proponents conceded that the language "could be clearer," but insist that discrimination is not what they intend. Regardless of intentions, Ballot Measure 8, if passed, would constitute a license to hire and fire state employees on the basis of their private sexual preferences.

Finally, a few opponents of Ballot Measure 8 pointed out that the initiative process may not be the appropriate mechanism for revoking an executive order. The concern is that a legislative action is being used to invalidate a decision of the executive branch, which would violate separation of powers principles of constitutional law. Your

Committee did not perform an exhaustive analysis of the constitutional principles involved. However, your Committee does believe that the argument raises an area of serious concern.

#### V. CONCLUSION

Executive Order 87-20 should not be revoked. It is of limited applicability and creates no special rights for any persons. The perceived symbolic effect of the Executive Order is speculative at best and provides no basis for its revocation. Most important, the ballot measure designed to revoke the order would accomplish more than that. It would effectively grant permission to state agencies to engage in discrimination based on sexual orientation in making employment decisions.

#### VI. RECOMMENDATION

Your Committee recommends a "No" vote on Ballot Measure 8 on November 8, 1988.

Respectfully submitted,

Nancy Craven  
Daniel Dallabrida  
Karen Jacobson  
Sheryl Warren  
Jack Landau, Chair

Approved by the Research Board on September 22, 1988 for transmittal to the Board of Governors. Approved by the Board of Governors on October 3, 1988 for publication and distribution to the membership, and for presentation and vote on October 21, 1988.

Appendix A: Persons Interviewed

T.J. Bailey, Chair, Oregon State Republican Party  
Robert Bobosky, Chairman, Oregon Business for Responsible  
Public Policy  
Jann Carson, Steering Committee Member, Oregonians for  
Fairness  
Marsha Congdon, Vice President, U.S. West Communications  
Dr. James DeYoung, Professor of Biblical Studies, Western  
Conservative Baptist Seminary  
Tom Koberstein, Executive Director, Cascade AIDS Project  
Scott Lieuallen, Co-chair, Oregonians for Fairness  
Representative Randy Miller (Dist. 24, Lake Oswego)  
Stevie Remington, Executive Director, ACLU of Oregon  
Cory Streisinger, Legal Counsel to Governor Neil Goldschmidt  
Michael Wiley, Communications Director, Oregon Citizens  
Alliance  
Janice R. Wilson, Chair, ACLU Commission on Gay and Lesbian  
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Appendix B: Bibliography

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Cory Streisinger, Testimony before Joint Interim Judiciary Committee.

Michael A. Wiley, "Writer Disagrees with Editorial Claim Executive Order Gives No Special Rights," Eugene Register-Guard (no date).

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