A City Club Report on Ballot Measure 73

City Club of Portland (Portland, Or.)

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STATE OF OREGON MEASURE 73:

Requires increased minimum sentences for certain repeated sex crimes, incarceration for repeated driving under influence

Ballot Measure 73 would increase the minimum sentences for certain repeat sex offenses and repeat driving under the influence of intoxicants (DUII). Proponents of the measure argue that increased sentences for these crimes are necessary to protect the public from dangerous repeat offenders and would lower rates of recidivism, i.e. repeat criminal behavior.

The measure’s proponents defend the pairing of sentencing policy for sex offenders and DUIIs as focusing on two types of dangerous re-offenders. Your committee, however, found no logical connection between these distinctly separate classes of crimes, other than their potentially uniform political appeal. Thus, your committee separately analyzed the public safety and cost issues related to each set of crimes.

Your committee found that the sex offender component of Measure 73 had a limited public safety and fiscal impact because it would apply to very few offenders, for whom long sentences are either currently mandated or imposed by judges. The DUII component of the measure would apply to many more offenders annually and is responsible for the majority of the fiscal impact of the measure. Your committee found that the measure’s increased mandatory minimum sentences for repeat DUII offenders are also unlikely to increase public safety and could undermine programs that currently reduce the incidence of repeat DUII crimes by diverting public safety funds away from these programs.

Finding no compelling evidence that either the sex offender or the DUII component of Measure 73 would enhance public safety, your committee opposes the mandatory minimum sentences included in the measure. Given the current state budget crisis, your committee’s opposition to the measure is even stronger because the cost of the measure would divert funds away from other critical state services.

Your committee is also concerned that Measure 73 improperly transfers power from judges to prosecutors and could have unintended consequences. These unintended consequences could include DUII sentences ten months longer than the 90 days required by the Measure and the possibility that juveniles exchanging explicit photographs could receive mandatory 25-year sentences.

Your committee recommends a “NO” vote on Measure 73.
INTRODUCTION

Ballot Measure 73 will appear on the ballot as follows:

REQUIRES INCREASED MINIMUM SENTENCES FOR CERTAIN REPEATED SEX CRIMES, INCARCERATION FOR REPEATED DRIVING UNDER INFLUENCE

RESULT OF “YES” VOTE: “Yes” vote increases minimum sentences for certain repeated sex crimes (300 months), imposes minimum incarceration sentence for certain repeated driving under influence convictions (90 days).

RESULT OF “NO” VOTE: “No” vote retains mandatory-minimum sentences of 70 to 100 months for certain sex crimes, provides no mandatory-minimum incarceration sentence for driving under influence.

SUMMARY: Current law imposes mandatory-minimum sentences of 70 to 100 months for certain sex crimes; no mandatory-minimum incarceration sentence for driving under influence of intoxicants (DUII). Measure imposes mandatory-minimum sentence of 300 months for person convicted of “major felony sex crime” if previously convicted of “major felony sex crime” if previously convicted of major felony sex crime; defines “major felony sex crime” as first-degree rape, first-degree sodomy, first-degree unlawful sexual penetration, using child in sexually explicit display; previous conviction includes statutory counterpart in another jurisdiction, and separate criminal episode in same sentencing proceeding. Measure makes DUII a Class C felony if defendant previously convicted of DUII, or statutory counterpart, at least twice in prior 10 years; imposes mandatory-minimum sentence of 90 days, at state expense. Other provisions.

Estimate of Financial Impact

The Measure will require additional state spending of $1.4 million in the first year, $11.4 million to $14.6 million in the second year, $13.9 million to $21.0 million in the third year, $16.7 million to $26.6 million in the fourth year, and $18.1 million to $29.1 million each year after that. The Measure does not require additional local government spending. The Measure directly reduces expenditures for local government by $0.4 million in the first year and $3.2 million to $4.6 million each year after that, primarily by shifting costs to the state. The Measure does not affect the amount of funds collected for state or local government.

(The caption, question and summary were prepared by the attorney general and certified by the secretary of state.)

City Club’s Board of Governors chartered this study to review Measure 73 and to author a report to help Club members and the public to better understand the implications of the measure and to recommend a “yes” or “no” vote. The nine members of your committee were screened for conflicts of interest and public positions on the subject of the measure. The study was conducted during August and September 2010. Committee members interviewed proponents and opponents of the measure and persons with professional knowledge about the issues raised by the measure. Your committee viewed relevant articles, research reports, past City Club reports and other material.
BACKGROUND

EXPLANATION OF MEASURE 73
Measure 73 is an initiative petition that would (1) impose a mandatory minimum prison sentence of 25 years for certain repeat sex offenders and (2) make a third driving under the influence of intoxicants (DUII) conviction a Class C felony requiring a stated minimum jail sentence of 90 days.

Current sentencing guidelines for the sex crimes included in Measure 73 call for 70 to 300 months (5 years and 10 months to 25 years) for the first conviction, with 25-year sentences mandated when the offender is an adult and the victim is under 12.

Under existing law, DUII convictions are misdemeanors through the third conviction; conviction of a misdemeanor for DUII imposes a minimum sanction under the law of 80 hours of community service or two days in jail. Under current sentencing guidelines for repeat felony offenders convicted of driving under the influence of intoxicants, judges can impose 13- to 30-month sentences starting with the fourth conviction.

Measure 73 follows similar criminal sentence-enhancing initiatives in 1994 (Measure 11 – Person Crimes) and 2008 (Measure 61 – Property Crimes). Measure 11 was approved by voters while Measure 61 was rejected.

PRIOR SENTENCING GUIDELINES
Except for those sentences that have been established through the initiative system, Oregon sentences for criminal acts are set by judges based on legislatively adopted sentencing guidelines. The guidelines use a matrix that considers the seriousness of the crime and the criminal history, if any, of the offender. The guidelines also include the possibility of reducing a sentence to a limited degree to encourage good behavior.

A judge may decrease the presumptive sentence below the range provided in the guidelines, but must justify the reduction. Such reductions from the presumptive sentences are called “downward departures.” A judge’s freedom to increase punishment beyond what is provided for as a maximum sentence in the guidelines has been limited in the case of a jury trial by recent decisions of the United States Supreme Court requiring that the reasons for the increase be decided by the jury. These sentencing guidelines only apply to those crimes that do not carry mandatory minimum sentences established through the initiative system by Measure 11 in 1994 and Measure 57 in 2008.

MEASURE 11 (1994) — PERSON CRIMES
In 1994, voters passed Measure 11, which provides mandatory minimum sentences for twenty-six felonies against persons when the perpetrator is fifteen years of age or older. These felonies include: murder and attempted murder, manslaughter, assault, kidnapping, rape, sodomy, unlawful sexual penetration, and robbery in the first and second degrees, arson and sexual abuse in the first degree, using a child in a display of sexually explicit conduct, and compelling prostitution. Except for murder (25 years), the mandatory minimum sentences range from 5 years and 10 months to 10 years. The judge cannot reduce the sentence, but may increase it subject to constitutional limitations. In short, for crimes covered by Measure 11, prior sentencing guidelines no longer apply. The mandatory minimum sentences must be served in their entirety, with no reduction for any reason, including good behavior.

In 2000, City Club recommended passage of Measure 94; a “yes” vote on Measure 94 would have repealed Measure 11, reinstating the pre-Measure 11 legislatively adopted sentencing guidelines. The study committee examining the Measure 11 concluded that it was not only “too harsh in its treatment of juveniles,” but also that it failed to “allow judges enough flexibility and authority to set appropriate sentences.” Measure 94 was defeated by Oregon voters 1,073,275 to 387,068.

MEASURES 57 & 61 (2008) — PROPERTY CRIMES
In 2008, Measure 61 was presented to voters. Measure 61 sought to do for property crimes what Measure 11 did for person crimes. The ballot title of Measure 61 read “creates mandatory minimum prison sentences for certain theft, identity theft, forgery, drug and burglary crimes.” The Legislature saw the proposed Measure 61 as too costly and inflexible and drafted a legislative referral as an alternative, Measure 57. Measure 57 proposed to “increase sentences for property and drug-related crimes and for identity fraud, and establish mandatory minimum sentences for certain repeat offenses.” Unlike Measure 61, Measure 57 also proposed to continue allowing some flexibility in sentencing, which was consistent with then-current sentencing guidelines.
In their 2008 study of Ballot Measures 61 and 57, a City Club study committee unanimously recommended a “no” vote on Measure 61. The committee based its recommendation mainly on the measure’s cost and its conclusion that “the rate of property crime in Oregon is already in decline, without [the] measure.” The committee’s majority also recommended a “no” vote on Measure 57, while the committee’s minority recommended a “yes” vote on the measure. City Club adopted the minority report supporting a “yes” vote on Measure 57. The entire committee viewed both measures as “flawed public policy,” but the minority concluded that “a principled stand on both measures risked a victory for Measure 61.” The minority felt that Measure 57 was a reasonable “compromise between the public’s desire for holding perpetrators responsible for their actions and the need for a less expensive and less simply punitive system.” Oregon voters approved Measure 57 (over Measure 61), but—despite its lower cost—the Legislature has delayed its implementation for lack of funds.
ARGUMENTS PRO AND CON

ARGUMENTS ADVANCED IN FAVOR OF MEASURE 73

Proponents of Measure 73 made the following arguments in favor of the measure:

- Enhances public safety through lengthy incarceration of dangerous offenders.
- Serves as a deterrent to potential offenders.
- The recidivism rate for sex offenders is high.
- Assures just and fair treatment of dangerous repeat offenders.
- Provides opportunities for offenders to receive treatment during incarceration.
- Remedies the Legislature’s failure to address this issue.
- Satisfies the public’s expectation that repeat offenders be sufficiently punished for their crimes.
- Saves money by decreasing the social costs associated with these crimes.

ARGUMENTS ADVANCED AGAINST MEASURE 73

Opponents of Measure 73 made the following arguments against the measure:

- Pairs unrelated issues into a single ballot measure.
- Might reduce the reporting of sex crimes, which are most commonly committed by individuals known to the victim, often family members.
- Applies the same penalties to minors ages 15 to 17 as to adult offenders.
- Enhanced sentencing for the crime of “using a child in sexually explicit display” could be used to prosecute juveniles for “sexting.”
- Mandatory minimum sentences for sex offenses have been applied in ways that were later adjudicated to be unconstitutional.
- Perpetrators of many categories of sex offenses have a low rate of recidivism.
- Alternative treatment programs are more effective than increased sentences for DUII offenders.
- Lacks clarity as to whether three-time DUII offenders are to receive sentences of 90 days or 13-30 months.
- Creates a potential incentive to counties to prosecute DUII offenders ahead of other offenders, as the measure provides pre-trial reimbursement to counties for three-time DUII offenders.
- Diverts public safety funds away from more effective programs.
- Erodes judicial discretion and increases prosecutorial power.
- A conviction of multiple counts could result in repeat offender status for individual on the first conviction.
- Mandates state funding for incarceration ahead of other important state services.
DISCUSSION

At first glance, Ballot Measure 73 appears to present a reasonable proposition. Everyone wants to make Oregon safer and keep dangerous individuals out of our communities and off our roads. Your committee acknowledges the appeal of increasing sentences for repeat sex offenders and intoxicated drivers and expects that most Oregonians will share this sentiment. Yet though the measure has appeal on an immediate and emotional level, an in-depth examination of the measure demonstrates that it may not make Oregonians safer and would likely have the opposite effect by redirecting limited resources away from programs that effectively decrease recidivism toward those that, for the most part, only satisfy the public’s desire to punish wrongdoing. Because almost all of the criminals subject to this measure will ultimately be released, although admittedly after serving longer sentences, your committee believes programs that specifically and effectively aim to prevent these criminals from repeating their offenses are more worthy of our limited public safety funds. A close inspection of the evidence also reveals troubling issues related to the necessity and efficacy of longer sentences, the costs of longer sentences and the use of the initiative process to mandate sentences for two very different types of crimes.

Given the immediate and emotional reaction the public will likely have to the two types of offenders targeted by Measure 73, one might conclude that the measure is a response to either an increase in these types of offenses, or a public outcry for longer sentences for these types of offenses. In your committee’s review, however, we did not find statistical evidence of increased occurrence of either of the two types of offenses addressed by the measure. In fact, many of the witnesses interviewed provided data and testimony to the contrary. In addition, your committee sees no public outcry over current sentencing policy for repeat sex offenders or intoxicated drivers.

In addition to a lack of evidence that Measure 73 is a timely response to current crime levels or public outrage, your committee found little connection between the different types of crimes and the different types of offenders impacted by the measure. While proponents of the measure advanced several arguments for pairing these two very different offenses, your committee determined that the two components of the measure were completely different and required separate evaluation.

REPEAT SEX OFFENDER SENTENCING

Measure 73 would apply to four major felony sex crimes, including rape in the first degree, sodomy in the first degree, unlawful sexual penetration in the first degree and using a child in a display of sexually explicit conduct. These crimes are Measure 11 crimes which already carry mandatory minimum sentences of 70 to 300 months. Additionally, the 2006 passage of legislation known as “Jessica’s Law” set 25-year mandatory minimum sentences for adults convicted of first degree rape, sodomy or sexual penetration of a child under the age of twelve. Oregon is one of several states to pass similar “Jessica’s Laws,” named for a nine-year-old Florida girl who was kidnapped, raped and murdered in 2005 by a previously convicted sex offender.

The Department of Corrections estimates that Measure 73 would impact approximately 13 sex offenders each year. Because lengthy sentences for sex offenders are currently available and are already frequently mandated or applied, the Department of Corrections estimates that Measure 73 sentences for sex offenders would average ten years longer than under current law. As a result, both the differential in release date for sex offenders and the cost component associated with the measure’s longer mandatory minimum sentences would not take place for many years.

Because current sentencing policy, including the 25-year mandatory minimum sentences in place under Jessica’s Law, requires or encourages judges to impose long sentences for the most egregious sex offenders, your committee concluded that the measure is unlikely to enhance public safety. As noted by Multnomah County District Attorney Michael Schrunk, “We have the tools to take [dangerous individuals] out of society under current law.”

“An in-depth examination of the measure demonstrates that it may not make Oregonians safer and would likely have the opposite effect by redirecting limited resources away from programs that effectively decrease recidivism toward those that, for the most part, only satisfy the public’s desire to punish wrongdoing.”
In addition to being unconvinced that Measure 73 would make Oregonians safer from dangerous sex offenders, your committee is concerned that lengthy mandatory minimum sentences could potentially reduce the reporting of sex offenses which are most often committed by people known to the victim: family members or close contacts. Victims may choose not to report the abuse in such circumstances if the length of sentences for these offenders would create additional financial or social hardships, especially in light of the fact that Oregon lacks adequate victim resources. In 2009, there were 19,506 requests for domestic violence shelter in Oregon that existing programs were unable to meet. Although this figure may contain duplications if individuals called more than one shelter, mandating that additional resources be spent on longer periods of incarceration for sex offenders seems inappropriate at a time when funding is insufficient to meet all current requests for services from victims of domestic and sexual violence.

The National Alliance to End Sexual Violence believes that “lengthy mandatory minimum sentences can have a number of negative consequences that serve to decrease, rather than increase, public safety. For example, lengthy mandatory minimum sentences sometimes result in prosecutors not filing charges or filing charges for a lesser crime than a sex offense, as well as increased plea bargains down to a lesser crime.”

Your committee also heard testimony that the measure’s lengthy mandatory minimum sentences could be applied to minors engaged in the not uncommon and relatively new phenomenon known as “sexting” — sending or exchanging sexually-explicit images, often over mobile phones. Because the 25-year mandatory minimum sentence would apply to minors age 15 and older, and multiple counts of transmitting such images could be considered prior criminal episodes, teenagers prosecuted for sexting could potentially receive 25-year mandatory minimum sentences.

The measure’s proponents discount the risk that a minor would ever receive the measure’s 25-year mandatory minimum sentence for sexting as a “phantom issue” because Measure 73 does not alter the underlying definitions of any criminal offense. Proponents argue that if Measure 73 would apply to sexting it is only because sexting is already a crime under the existing law, and if the law needs to be corrected, that correction needs to occur regardless of whether Measure 73 passes. Nevertheless, your committee believes that it is inappropriate to enhance the penalties that can be applied in such circumstances prior to excluding them from the underlying law. Because a two-thirds majority is required for legislative changes to reduce criminal sentences mandated by the voters, your committee is skeptical that legislative “fixing” of unintended consequences would happen as easily or as quickly as the proponents assert.

**REPEAT DUII SENTENCING**

Under current law, the third conviction for driving under the influence of intoxicants is classified as a Class A misdemeanor, while the fourth conviction is a Class C felony. Under Oregon’s sentencing guidelines, a DUII Class C felony carries with it a presumptive prison sentence of 13 to 30 months, depending upon previous criminal history and aggravating or mitigating circumstances. Judges must impose the presumptive sentence unless they make a “departure,” imposing a different sentence for “substantial and compelling reasons” which they must state on the record at the time of sentencing.
The Oregon Department of Corrections found that for 2008 and 2009, 83 percent of those convicted of DUII felonies (fourth DUII convictions) received prison sentences and that those prison sentences averaged 16 months. However, not everyone incarcerated goes to state prison; some serve their sentences in county jails. Your committee does not have data as to the current percentage of convicted DUII felons who serve time in county jail as opposed to state prison, or the length of those sentences.

**MULTNOMAH COUNTY DISP PROGRAM**

As an alternative to incarceration for multiple DUII convictions, Multnomah County offers a program called DUII Intensive Supervision Program (DISP). In this voluntary program, a person convicted of a DUII receives probation rather than incarceration and enters into a judge-supervised treatment program. DISP includes elements such as electronic monitoring, random urine analysis and close contact with the judge. The recidivism rate for those who successfully complete the DISP program is only 11.25 percent over the ten-year history of the program. Several other counties run similarly effective programs, including most of the more populated counties in the Willamette Valley.

**MEASURE 73 CHANGES TO REPEAT DUII SENTENCING PRACTICES**

Ballot Measure 73 reduces the number of prior DUII convictions which result in a Class C felony from four to three. The measure also requires a mandatory minimum 90-day period of incarceration upon conviction for a third DUII. However, because the measure makes a third DUII a Class C felony, which carries a presumptive sentence of 13 to 30 months, the 90-day mandatory minimum sentence is potentially misleading. Unless the Legislature or the Criminal Justice Commission act to change the sentencing guidelines to reduce the presumptive sentence for a Class C felony on a third DUII conviction, judges will have to depart from the 13 to 30 month sentences to give a sentence of 90 days.

In his testimony before your committee, Chief Petitioner Kevin Mannix stated that this issue would be resolved: “the Criminal Justice Commission will address this because it would be irresponsible for them not to address it.” Your committee is concerned that poorly written aspects of the measure would likely require legislative or administrative action to help clarify the measure’s intent. We believe that until such clarifying action is taken, judges will feel obligated to issue 13 month felony sentences for repeat DUIIs instead of the 90 days described in the measure.

Even with a clarification of the sentencing guidelines, the 90-day mandatory minimum will only have an effect for third-time DUII offenders, and for fourth-time offenders to the extent judges are currently departing so far from the 13 to 30 month presumptive minimum sentence that they are sentencing convicted DUII Class C felons to less than 90 days of incarceration. Your committee was not presented with evidence that judges are currently giving DUII Class C felonies sentences of less than 90 days and was thus unable to determine what effect the 90-day mandatory minimum sentence will have on sentencing practices, aside from moving the felony conviction from fourth conviction to third.

Currently, the ability to avoid incarceration is a significant incentive for DUII offenders to enter Multnomah County’s DISP or similar programs in other counties. The measure’s 90-day mandatory minimum sentence would mean that the supervising judge would need to sentence the DUII offender to at least 90 days in jail before allowing the offender to enter DISP, thus making it less likely that offenders who could benefit from DISP will take advantage of it.

**MEASURE 73 IMPACT ON INCIDENCE OF REPEAT DUII**

Your committee has concluded that Ballot Measure 73 is unlikely to increase public safety by reducing the number of persons driving while under the influence of intoxicants for the following reasons:

First, literature on the subject concludes that incarceration does
not act as an effective deterrent to those who would drive under the influence of intoxicants. Reviewing the academic literature, the Multnomah County Sheriff’s Office noted that “research studies generally conclude that using jail as a sanction to prevent future DUII offenses simply does not work.”

Rather, it appears that treatment for those with substance abuse issues is the most effective way to prevent repeat DUIIs. According to state Senator Chip Shields, “[T]he issue isn’t about how to lock up drunk drivers, it is how to get people not to drive drunk.”

Second, an increase in those sentenced to jail or prison will require more beds, pulling limited public safety funds away from programs that more effectively reduce intoxicated driving, such as increasing treatment programs, and providing more funding for state troopers. As a 2008 City Club report on Measures 61 and 57 concluded, “[T]he additional funds needed for the increased prison population could be met only by cutting other state services or raising taxes.”

Third, it is unclear that those serving mandatory minimum sentences will receive treatment for substance abuse. Because evidence-based substance abuse treatment is now mandated in Oregon prisons, it is possible that such treatment while in prison will reduce the amount of intoxicated driving when individuals are released. However, to the extent that those incarcerated serve their sentences in county jail as opposed to state prison, they are unlikely to receive any treatment for substance abuse problems.

Fourth, contrary to popular belief, fatalities caused by drunk drivers with prior convictions are surprisingly few. Indeed, DUII fatalities appear to be random and without relation to prior DUII convictions. From 2007 to 2009, 97 percent of DUII convictions with a fatality were for offenders with no prior DUII. Thus, Ballot Measure 73 appears unlikely to reduce traffic fatalities caused by intoxicated drivers.

In addition, it is possible that the mandatory minimum sentence of 90 days will lead to the early release of other incarcerated persons who do not have mandatory minimum sentences, but who might be more dangerous to the public than those incarcerated for intoxicated driving.

Your committee also sees possible incentives for county prosecutors to pursue Measure 73 offenders ahead of offenders for whom the state would not reimburse pre-trial expenses if resource constraints force them to choose between prosecuting offenders covered under this law or those who have committed crimes for which pre-trial reimbursement is not available. Moreover, creating a new reimbursement system for these DUII offenders will place an additional administrative burden on counties to track costs for these offenders differently than all others.

These findings are consistent with past findings from City Club studies on the efficacy of mandatory minimum sentences which have concluded that the “inflexibility of Measure 11 sentences is a serious flaw” and that “there is good evidence that treatment is more cost-effective at preventing drug-related crimes.”

In his testimony, Senator Shields said, “Real public safety is about more than building more and more prisons. It’s about putting officers on the street, it’s about drug and DUII courts and treatment, it’s about Head Start programs and it’s about providing services to sexual assault and domestic assault survivors.”

JUDICIAL DISCRETION VS. PROSECUTORIAL POWER

Ballot Measure 73 would have the effect of shifting more sentencing power away from judges and toward prosecutors. This shift began with Measure 11 and would only accelerate with the passage of Measure 73. As City Club’s 2008 Report on Ballot Measures 61 and 57 explained, “[b]y eliminating the power of judges to mitigate sentences, [Measure 11] increased the power of prosecutors.” Prosecutors received increased bargaining leverage from the lengthy sentences mandated by Measure 11. Since prosecutors have significant discretion in how they choose to prosecute a particular offence, under Measure 11 they could raise the specter of a long and certain prison sentence as a way of compelling a guilty plea for a lesser charge. This practice has certainly led to fewer convic-
tions of Measure 11 crimes than would otherwise have been the case, raising serious questions about whether some dangerous criminals are receiving inappropriately light sentences, or the possibility that some innocent defendants are being coerced into accepting the punishment of a lesser crime to avoid the possibility of being convicted of a Measure 11 offense. Compounding these issues is the fact that prosecutors have not been consistent in their charging practices. In its June 2010 Report, the Governor’s Reset Cabinet Subcommittee on Public Safety pointed out that only 16 percent of offenders prosecuted in Clatsop County were convicted of the most serious Measure 11 offense for which they were indicted, whereas in Marion County, 54 percent were convicted of such crimes in the same time period. In other words, an offender is more than three times as likely to be sentenced pursuant to the longest mandatory minimum sentence for which he or she is indicted in Marion County as in Clatsop County.

Proponents of Measure 73 believe this prosecutorial discretion works to ensure that prosecutors will not charge defendants with Measure 73’s increased penalties when the underlying facts suggest that such charges would be inappropriate, such as the application of the sex crimes portion of Measure 73 to teenagers engaged in sexting. Proponents explain that prosecutors would be reluctant to bring charges which would result in 25-year mandatory minimum sentences for “sexting” by minors in light of the recent Oregon Supreme Court decision in State v. Rodriguez. The Supreme Court found that the imposition of mandatory Measure 11 sentences were unconstitutional in some cases because the penalties were disproportionate to the underlying offenses. Proponents say the Rodriguez ruling will restrain prosecutorial discretion and discourage prosecutors from seeking Measure 73 penalties in cases where the facts simply don’t warrant such stiff sentences.

The problem with this argument is that it relies on an extremely high level of trust in prosecutorial discretion. The fact that the Oregon Supreme Court had to issue its decision in Rodriguez in the first place demonstrates that prosecutors have gone too far in charging defendants for Measure 11 crimes. Whether this decision will prevent future prosecutorial abuses is an open question. Since the Rodriguez decision did not provide a definitive rule making it easy to determine when a prosecutor oversteps the line, we are left to rely on the individual wisdom and discretion of each prosecutor.

To some extent, of course, we trust those involved in our criminal justice system, including the prosecutors, judges and defense attorneys. But your committee believes, consistent with past City Club precedent, that it is better public policy to put more discretion in the hands of judges, who are more directly accountable to the citizenry and who evaluate each case on the merits through the criminal justice process, than in prosecutors.31

CITIZEN INITIATIVE AND SENTENCING POLICY

In his testimony before your committee, Mr. Mannix stated that he uses the citizen initiative process when the Legislature “can’t or won’t” deal with an important issue. But while reducing the incidence of crimes targeted by Measure 73 is important, current studies show that increased sentences would not significantly enhance public safety and, consequently, the associated costs cannot be justified.

While Mr. Mannix would argue that the initiative process is an effective “tip of the spear” to force legislative action on related issues, your committee finds that it is in fact a blunt tool incapable of dealing with complicated policy questions. The right policy solution to these issues cannot easily be enacted through the initiative process because policies created through this process are rarely evaluated for their potential efficacy as carefully as legislative approaches. Your committee acknowledges that there may be room for improvement in how we sentence and treat these classes of offenders. However, we believe that providing more resources for treatment, expanding DUI programs that work and providing better tools for monitoring sex offenders once they are released are far better uses of limited public safety resources than increased mandatory minimum sentences.

* This discretion only applies to the sex crimes portion of Measure 73 since prosecutors do not have this kind of discretion in regard to DUIIs. Prosecutors are prohibited by law from negotiating down a DUII charge.
ECONOMIC IMPACT OF MEASURE 73

Your committee believes that relying on cost as a principal factor in evaluating Measure 73 would be a mistake. Given Oregon’s current fiscal crisis, it would be easy to object to the costs mandated by the measure without regard for other state services on the basis of cost alone. However, given the frequency with which mandatory minimum sentencing measures have been placed before the voters and the likelihood of such measures continuing to come before voters, possibly at times when the state budget situation is rosier than today, your committee decided to weigh the benefits of the measure before discounting it as unaffordable.

When considering the fiscal impact of Ballot Measure 73, it is important to consider separately the two crimes covered under the measure, since the estimates of their cost are based on different assumptions.

For sex crimes, the cost is nominal and no fiscal impact is felt until many years in the future. This is because the 13 people a year who are estimated to receive increased sentences under Measure 73 are already receiving prison terms of at least 70 to 300 months, so the cost of the additional years will not be incurred until after they serve the original time they would serve under current law.

For DUII cases, however, the cost is immediate, increases over time and depends heavily on sentencing practices on a county by county level. Based on the reporting of district attorneys to the Department of Corrections, sentences among counties would be disparate, with sentences in Multnomah County closer to the minimum 90 days required while those in Jackson County and Lane County would be longer. The official fiscal impact statement assumes that the average sentence under Ballot Measure 73 for DUII offenses will be closer to the sentencing guideline recommendation of 13 months for Class C felonies than to the 90-day mandatory minimum required under the measure. The petitioners assert that this assumption falsely inflates the cost of Ballot Measure 73 since it is likely that if the measure passes, the Class C felony sentencing guidelines will be amended to conform to the lower 90-day mandatory minimum sentence. Your committee agrees that this is possible and that the fiscal impact statement for the measure may well overstate its cost.

However, the official fiscal impact statement recognizes the wide range of how much Measure 73 may potentially cost. For example, the costs in the fourth year following the measure’s passage range from $16.7 million to $26.6 million. Your committee acknowledges that the cost of the measure is very difficult to determine due to the myriad variables that must be considered when making such an estimate. If, for example, the number of repeat drunk drivers increases, Measure 73 may well result in more persons being sent to jail and cost more. Yet, if, by contrast, the knowledge that a 90-day minimum sentence will be imposed upon their third conviction for DUII encourages more people to get into treatment earlier, the cost of Measure 73 may be less than currently assumed. In short, the cost of Measure 73 is a moving target and depends highly on factors beyond the state’s control.

As noted in City Club’s 2008 report on the Oregon’s initiative and referendum system, “financial impact statements also are limited by the challenges associated with forecasting future events.” That report concluded the following: “[T]he limited reliability of financial impact statements offers support for the position that the Legislature is a better venue for deliberating measures that affect revenue and appropriations. The Legislature considers the financial impact of an issue in the context of the budget as a whole and ideally seeks to balance priorities, while financial impact statements regarding an initiative give voters information about that initiative’s impact in a vacuum.” In short, the Legislature, rather than voters at large, is best positioned to evaluate the merits of proposed laws with potentially large fiscal impacts.

IMPACT ON OTHER STATE SERVICES

Measure 73 provides no new money to pay for the increased cost it will require. Given the current state revenue situation, this measure is more unaffordable now than when the chief petitioners filed the initiative in December 2007.
A City Club Report on Ballot Measure 73

The Oregon Reset Cabinet that convened in response to the 2009 reductions in the State budget was charged with developing “a plan containing specific recommendations to the Governor to reset State government’s core functions and stabilize its revenue structure.”

The Reset Cabinet included a Subcommittee on Public Safety, which focused on the most expensive element of the state’s public safety system: prisons. It determined that the main cost drivers in building and operating prisons are who is entering the prison system and how long they stay. The Subcommittee based its recommendations on what “gives taxpayers the greatest return on their public safety investment and continues to protect communities and reduce crime victimization.”

The major priority of the public safety system must be to protect the public from the truly dangerous offenders through the use of effective risk assessment, sentencing and incapacitation in prison. The Subcommittee noted that there is no state-wide policy to guide the prioritization or use of the prison bed resource. They observe that the disposition phase of negotiating the sentence is not guided by any written policy; neither is it informed by feedback about how the different practices in each county affect the state’s public safety spending.

The Public Safety Subcommittee identified several current circumstances relevant to its analysis:

- Oregon is a safer place than it was 20 years ago. By objective measures, crime has declined in the state. At the same time, polls indicated that the public believes that crime is on the increase. This suggests a disconnect between Oregonians’ perception of increased crime and the reality that they are safer today than they have been in decades.

- Oregon invested hundreds of millions of dollars in increased incarceration in the last twenty years. Spending in Oregon has focused on the severity of punishment as measured by the length of the prison sentence, while at the same time cities’ and counties’ local response to crime has been hampered by lack of funding. Public safety professionals are faced with shrinking revenues and fewer resources.

- Investing in incarceration feels like a sure bet. While the offender is locked up he or she cannot commit new crimes. However, 93 percent of all offenders return to the community. Investments solely in longer periods of incarceration may not be the best long-term way to reduce the number of new crimes by offenders leaving jail and prison. Greater resources should be tied to the reentry and reintegration of offenders into society.

The Public Safety Subcommittee’s report is relevant to a discussion of Ballot Measure 73. Several of its recommendations conflict with the measure, including the recommendation to move away from mandatory minimum sentencing and adopt a modern sentencing guideline system. Other recommendations include the following:

- Create a modern system of uniform, transparent and proportional sentencing guideline practices. Sentencing policy, not crime rates, drives the use of expensive prison beds.

- Adopt the federal system of 15 percent earned-time credits for offenders, including greater use of transitional resources such as halfway house and electronic monitoring during the final year of sentencing on appropriately screened offenders.

- Selectively adjust Ballot Measure 11 sentences to provide sufficient protection for the public, but lower the overall impact on prison beds.

- Continue to suspend the implementation of the sentencing enhancements contained in Measure 57. A decision to delay this implementation would result in estimated savings of almost $40 million in the 2011-2013 biennium alone.

The Subcommittee emphasized the importance of balancing spending between incarceration and programs that directly impact crime and incarceration rates, such as mental health, alcohol and drug treatment and post-incarceration supervision.
CONCLUSIONS

- Your committee found a lack of compelling evidence suggesting that longer sentences for DUII convictions will enhance public safety.
- Your committee believes current penalties and sentencing practices for repeat sex offenders are sufficient.
- In keeping with earlier City Club reports on mandatory minimum sentences, your committee prefers relying on judicial discretion rather than increasing prosecutorial power.
- The measure is poorly written with significant risk of negative unintended consequences.
- Criminal justice resources are better spent on treatment programs and assistance for re-integration into society.
- Mandating increased expenditures is an inefficient appropriation of the public’s money without regard to other state services.
- One-size-fits-all initiatives are a troubling way to set sentences.

RECOMMENDATION

Your committee recommends a “NO” vote on Measure 73.

Respectfully submitted,

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WITNESSES

Eric Bloch, Judge, Multnomah County Circuit Court
Michael Schrunk, District Attorney, Multnomah County
Chip Shields, Senator, Oregon State Legislature
Max Williams, Director, Oregon Department of Corrections
David Rogers, Executive Director, Partnership for Safety and Justice
Craig Prins, Executive Director, Oregon Criminal Justice Commission
Kevin Mannix, Former State Representative, Oregon State Legislature; Chief Petitioner, Ballot Measure 73
Doug Harcleroad, Former District Attorney, Lane County
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CITATIONS

5  ORS 163.235.
6  Max Williams and Craig Prins, “Power Point Slides to Accompany Presentation to City Club Committee,” August 18, 2010.
7  Testimony of Michael Schrunk, District Attorney, Multnomah County, August 11, 2010.
11 ORS 813.010(4)(5); and ORS 813.012.
12 OAR 213-008-0001.
13 Williams and Prins, “Presentation to City Club,” August 18, 2010.
14 DUII Intensive Supervision Program (DISP) Defendant Handbook 3-4; and 2009 DISP Census Data 2.
16 Testimony of Eric Block, Judge, Multnomah County Circuit Court, August 11, 2010.
19 Ibid., p 2.
21 Ibid.
24 Williams and Prins, “Presentation to City Club,” August 18, 2010.

25 Testimony of Max Williams, Director, Oregon Department of Corrections; and Craig Prins, Executive Director, Oregon Criminal Justice Division, August 18, 2010.

26 Testimony of Max Williams and Craig Prins, August 18, 2010.


29 Ibid.


32 Williams and Prins, “Presentation to City Club,” August 18, 2010.


37 Ibid.

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State v. Rodriguez, 347 Or. 46 (2009).


Williams, Max and Craig Prins. “Power Point Slides to Accompany Presentation to City Club Committee.” August 18, 2010.

The mission of City Club is to inform its members and the community in public matters and to arouse in them a realization of the obligations of citizenship.

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