

EMPLOYMENT OF HOMOSEXUALS
AND OTHER SEX PERVERTS
IN GOVERNMENT

(Excerpts)

"The primary objective of the subcommittee in this inquiry was to determine the extent of the employment of homosexuals and other sex perverts in Government; to consider the reasons why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem. . . .

"For the purpose of this report the subcommittee has defined sex perverts as 'those who engage in unnatural sexual acts' and homosexuals are perverts who may broadly be defined as 'persons of either sex who as adults engage in sexual activities with persons of the same sex.' . . .

"This investigation is concerned only with those who engage in overt acts of homosexuality or other sex perversion. . . .

"[S]ex perverts, like all other persons who by their overt acts violate moral codes and laws and the accepted standards of conduct, must be treated as transgressors and dealt with accordingly.

"In the opinion of this subcommittee homosexuals and other sex perverts are not proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks. . . .

"Perverts lack the emotional stability of normal persons . . . [T]here is an abundance of evidence to sustain the conclusion that indulgence in acts of sexual perversion weakens the moral fiber of responsibility. . . . The presence of a sex pervert in a Government agency tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people. . . . One homosexual can pollute a Government office. . . .

"The conclusion of this subcommittee that a homosexual or other sex pervert is a security risk is not based upon mere conjecture. That conclusion

is predicated upon a careful review of the opinions of those best qualified to consider matters of security in Government, namely, the intelligence agencies of the Government. Testimony on this phase of the inquiry was taken from representatives of the Federal Bureau of Investigation, the Central Intelligence Agency, and the intelligence services of the Army, Navy, and Air Force. All of these agencies are in complete agreement that sex perverts in Government constitute security risks. . . .

"An individual check of the Federal agencies revealed that since January 1, 1947, the armed services and civilian agencies of Government have handled 4,954 cases involving charges of homosexuality or other types of sex perversion. It will also be noted that the bulk of these cases are in the armed services as is indicated by the fact that 4,380 of the known cases in Government involved military personnel and 574 involved civilian employees. . . . The military services, unlike most Government agencies, traditionally have been aggressive in ferreting out and removing sex perverts from their ranks and this is bound to make for a larger number of known cases in the services. . . . Many of the civilian agencies of the Government [have been] either negligent or otherwise failed to discover many of the homosexuals in their employ. . . .

". . . The subcommittee has found that many civilian agencies of government have taken an entirely unrealistic view of the problem of sex perversion and have not taken adequate steps to get these people out of government. . . . In many cases the fault stemmed from the fact that personnel officers and other officials . . . handled the problem in accordance with their individual feelings or personal judgments in the matter. . . . [There were those] who adopted . . . the false premise that what a Government employee did outside of the office on his own time, particularly if his actions did not involve his fellow employees or his work, was his own business. That conclusion may be true with regard to the normal behavior of employees in most types of Government work, but it does not apply to sex perversion or any other type of criminal activity or similar misconduct. . . .

"There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct. Such persons are not suitable for Government positions and in the case of doubt the American people are entitled to have errors of judgment on the part of their officials, if there must be errors, resolved on the side of caution. . . .

"It is quite apparent that as a direct result of this investigation officials throughout the Government have become much more alert to the problem of the employment of sex perverts in Government and in recent months they have removed a substantial number of these undesirables from public positions. This is evidenced by the fact that action has been taken in 382 sex perversion cases involving civilian employees of Government in the past 7 months, whereas action was taken in only 192 similar cases in the previous 3-year period from January 1, 1947 to April 1, 1950. . . .

"Since the initiation of this investigation considerable progress has been made in removing homosexuals and similar undesirable employees from positions in the Government. However, it should be borne in mind that the public interest cannot be adequately protected unless responsible officials adopt and maintain a realistic and vigilant attitude toward the problem of sex perverts in the Government. To pussyfoot or to take half measures will allow some known perverts to remain in the Government. . . . The subcommittee plans to reexamine the situation from time to time to determine if its present recommendations are being followed and to ascertain whether it may be necessary to take other steps to protect the public interest." [END OF EXCERPTS FROM SENATE REPORT]

As will be discussed elsewhere in this Report, until the mid-Seventies, it was the official position of the federal government that homosexuals were unfit, per se, to serve in the federal civil service.⁷¹⁵ The Department of Defense and all branches of military service have consistently maintained a position of exclusion and have discharged homosexuals from the armed forces in this country. Statistics published in the Congressional Record on March 22, 1972, show that during the period of 1967 through 1971, over 2,000 persons were discharged from the service for alleged homosexual tendencies, while nearly 4,000 more were discharged for alleged homosexual conduct.⁷¹⁶ It is still the policy of the military to exclude and to discharge persons on these bases.⁷⁹³⁻⁸

It has been and continues to be the policy of the federal government, to exclude immigrants on account of their homosexuality and to deport those who manage to quietly enter the country.⁷¹⁷ Just a few years ago, the Immigration Service sent an official letter to one gay man, calling him a "faggot."⁷¹⁸ Community leaders objected to the use of that term, and the Immigration Service later retracted it. Anthony Sullivan, the immigrant in the case, commented, "I never expected to be called a faggot on a U.S.

Government document, for to gay people, faggot is our 'nigger' word and the world knows it."⁷¹⁹

According to an article which recently appeared in The Advocate, surveillance of suspected homosexuals, particularly wealthy men, as well as infiltration of gay organizations and engaging in "dirty tricks," were all part of a major F.B.I. operation during the Fifties, Sixties, and up to the late Seventies.⁷²⁰ Research for the article was undertaken with a grant from the Fund for Investigative Journalism. The extent of privacy invasions engaged in by the Federal Bureau of Investigation concerns this Commission very much. While the justification for the surveillance activities was "susceptibility to blackmail," thirty years of such operations revealed no tangible evidence of "gay security leaks" or "gay traitors," according to the study.

It is appropriate that the federal government reverse the tradition of discrimination against gays by ending its discriminatory practices and by encouraging state and local governments to do the same. Some progress to promote the fair treatment of lesbians and gay men, and to protect their personal privacy, has been made within many administrative agencies during previous administrations.

THE COMMISSION RECOMMENDS that members of the California congressional delegation initiate a series of regional hearings throughout the United States to determine the extent of sexual orientation discrimination, its causes, and the personal and social costs of such discrimination for the purpose of framing appropriate remedial legislation.

A few recent examples should suffice to remind the reader about the existence of official discrimination against lesbians and gay men in California.

Until 1976, private homosexual conduct between consenting adults, even in the privacy of their own bedrooms, was punishable by up to life imprisonment in California.⁷²¹ Slow dancing between persons of the same sex was a violation of the regulations of the Los Angeles Police Commission until the mid-Seventies.⁷²² Until recently, Judges of the Los Angeles Municipal Court often imposed conditions of probation on gay male defendants restraining them from "publicly associating with known homosexuals" and "frequenting places where homosexuals congregate."⁷²³ Until 1976, there was absolutely no recourse for persons who were fired by private employers who accused them of being homosexuals or for tenants

who were evicted from their apartments because they were gay.⁷²³ Even after decriminalization of private homosexual conduct in 1976, it remained a crime for one adult to ask another adult to engage in private consensual homosexual activities, so long as the request was made in a "public place," such as bars and nightclubs — ordinary gathering spots for social and sexual conversation.⁷²⁵ Public displays of affection, such as kissing, could subject a gay person to a jail term and lifetime registration as a sex offender, although the only "offended" viewer was an undercover vice officer.⁷²⁶

The following excerpts are taken from a memo which was distributed to Los Angeles police officers in 1975 by then Deputy Chief, R. L. Vernon:⁷²⁷

Little known to the public at large, the militant homosexual community has been organizing to alter their image by playing a vocally active part in society. In essence, the homosexual activists are attempting to by-pass or override the legal statutes of the Country, State and City by use of a minority discrimination stigma related to hiring practices. . . . Alleged discrimination of homosexuals by private businesses and civil services is being actively challenged at all levels. There is no area sacred from the homosexual when it comes to furthering their insurgent ideals. So it comes as no surprise that the Police Department and its heterosexual majority is under attack for its hiring practices. . . .

Homosexuals are preoccupied with illegal sexual relations. Sexual contact is very easily had and other things become clouded and the real value of things is lost because they spend so much time seeking self-gratification. Homosexuals have great difficulty establishing relationships. It is difficult to give of themselves with another person. . . .

[H]omosexuals tend to associate with disreputable persons, and otherwise lead disorganized lives. There is normally no real permanency to homosexual relationships as they are continually on the prowl looking for new sexual partners. . . .

Homosexuals have a corrosive influence upon their fellow employees because they attempt to entice normal individuals to engage in perverted sex practices. When this fails he will

return to his homosexual environment, for his primary loyalty is toward other homosexuals. They prefer individual pursuit of professions and hobbies, whereas the heterosexual is team oriented in both work and play.

Homosexual behavior is so contrary to accepted social standards that persons engaging therein are regarded as social outcasts. . . .

Another area which cannot be overlooked is the violence that is associated with homosexual conduct. The homosexual is constantly involved in crimes of violence, as both victim and perpetrator. Members of the homosexual community are responsible for some of our most heinous crimes. A striking example was the recent torture murders of 27 teenage boys in Houston, Texas. . . .

Any person who willingly engages repeatedly in homosexual activity is an emotionally sick person and definitely constitutes an unacceptable risk when qualifying as a police officer. . . .

Moreover, any person who deliberately adopts a way of life repugnant and abhorrent to the great majority of society, and who openly scoffs at the norms and laws of society, has questionable personal values making suspect the character factors most needed in a police officer: reliability, trustworthiness, judgment and integrity.

In a recent court case . . . the Court states, "Members of the police force must be above suspicion of violating the laws that they must uphold." Judicial pronouncements have further held homosexual conduct to be immoral, and of course, religious denunciation of homosexual conduct goes back at least several thousand years. . . .

As individuals we can say we don't want a homosexual as a policeman, which is our own personal position, based upon a strong moral upbringing. The point is that somewhere along the line of law and reason, the collective wants of society must rule. The hiring of homosexuals as police officers is repulsive to nearly all persons. . . .

It must be recognized that any adult who willingly engages repeatedly in homosexual activities is an emotionally

ill person and definitely constitutes an unacceptable risk for the position of Police Officer; so also may be the adult latent homosexual — married or unmarried — who engages only rarely in homosexual behavior under the temporary influence of alcohol or tension and stress, because such person may be more susceptible to coercion and pressure than the overt homosexual. Homosexual acts are inherently immoral, abnormal, and criminal — usually felonies. Habitual or repeated participation in homosexual acts constitutes behavior and activities which: (1) are evidence of such immaturity and character . . . as to indicate that the participant is not reliable or trustworthy; and (2) are reckless, irresponsible, and wanton in nature and indicate such poor judgment and instability as to suggest that the person involved might make a deliberate or inadvertent disclosure of sensitive information to known criminals or look the other way while crimes take place.

Since homosexuality in many cases is an underlying symptom to a much more serious mental disorder, the Medical examining staff, working within long established and proven medical and psychological practices, has disqualified those individuals who exhibit characteristics incompatible with the norms of this society and its Police. To retain the current trust of the community and the high level of efficiency enjoyed by the Los Angeles Police Department the disqualification of police applicants based on substantiated homosexual conduct must be continued.

After this official police department memo was distributed in the spring of 1975, members of the gay community in Los Angeles managed to obtain copies of it. A letter of protest to the Los Angeles Police Commission was sent by an attorney-spokesperson. Samuel L. Williams, on behalf of the Police Commission, responded on June 9, 1975:⁷²⁸

The opinions expressed in the research paper to which you make reference are not interpreted by you as reflecting favorably on the gay community. It should be noted that this research paper was prepared in response to a request made by the City Attorney, Mr. Burt Pines, to express the position of

the Chief of Police on the effect of hiring homosexuals on the Police Department. . . .

The research paper was made available to divisional commanding officers and their constituents, i.e., subordinate personnel . . . As professionals in their field, Department leadership was exercising its First Amendment right to give its opinion regarding a public issue under open consideration.

For those who might consider 1975 to be "ancient history" with respect to evidence of sexual orientation discrimination and displays of anti-gay prejudice, there are more recent examples of official prejudice. Nearly two years of such statements were publicly made by Senator Briggs and his supporters during 1977 and 1978.⁷²⁹ More recent examples are found in the utterances of Senator John Schmitz, for which he received an official censure by the State Senate.⁷³⁰ As recently as 1981, a member of the Board of Supervisors of one local community publicly announced that he "would not knowingly hire a 'queer'."⁷³¹

. . .

MYTH: Gays are Child Molesters

The accusation that "homosexuals are child molesters" appears to be based on a pervasive and often-used myth. This claim is often made by persons who crusade against having lesbians and gay men in certain "sensitive" positions, such as police work, hospital work, and jobs in elementary and secondary schools. The alleged justification for this position is that gays are likely to sexually exploit children.

Over 25 years ago the California Court of Appeal rejected the proposition that homosexuals were predisposed to commit acts of child molestation. Quoting from studies conducted by the state Department of Mental Hygiene, the Court noted that homosexuals are no more disposed to commit child molestation than are heterosexuals:⁷³²

"The facts are that the majority of homosexuals are no particular menace to society. A small number of them, like those who are heterosexual, will attempt to seduce or sexually assault others or try to initiate sex relations with small children."

Subsequent studies have consistently found that this myth has no basis in fact. As a matter of fact, a good amount of research has demonstrated that most child molestation cases are committed against young girls by men, often by members of the same family.⁷³³

The Oregon Task Force on Sexual Preference investigated the facts about child molestation and reported their findings:⁷³⁴

Sexual offenses against children are committed by males. The great majority of sexual offenses against children are heterosexual in nature: male offenders and female victims. Children are most often molested by members of their own family, rather than by strangers or people employed to work with children. Child molestation cannot be labeled either heterosexually or homosexually motivated; child molesters are motivated by their inability to establish satisfactory adult relationships, not by their heterosexual or homosexual orientation. Sexual activity among boys is common and most boys who engage in it have heterosexual orientations as adults. Male teenage prostitutes are more likely to be exploiters than

victims. Homosexuals are no more likely to molest children than are heterosexuals.

The annual reports on child abuse of the Children's Services Division show that in 1973-1975, 85-90% of child molesting was committed by fathers, stepfathers, foster fathers, grandfathers, brothers, uncles, and mothers' boy-friends. Another 6-10% were committed by men known to the family, such as friends, neighbors, and house boarders.

. . . Comparing Oregon figures with those of other areas, the Regional Resource Center for Child Abuse in Boise, Idaho, reported 83 child molestings from January through September of 1976, in which 95% of the victims were female. In a study of sexual abuse of children in Minneapolis in 1970, 88% of the victims were female and all of the offenders were men. . . .

Child molesting is primarily a problem within the family. Although child molesting is usually spoken of in public discussion as being a threat by strangers, it is most commonly committed by family members. Although employment of homosexuals in jobs working with children is opposed with arguments that homosexual teachers and youth workers may molest children, the fact is that it is more likely that a child will be molested by her or his own father than by a teacher, heterosexual or homosexual.

Statistics in California follow the same patterns as the rest of the country: female victim and male perpetrator. A study conducted by the County of San Francisco showed that of 107 child molestation cases reported during 1972, none was classified as "homosexual."⁷³⁵

When complaints were made that a police officer had intentionally distorted facts by repeatedly stating to the media and the public that 70 percent of child-molesting cases involved male victims, the Chief of the Los Angeles Police Department investigated the matter and found those figures incorrect and "misleading." The Chief stated, "I have admonished the unit and the officer who made the statement and we don't believe that kind of thing will happen again. . . . I personally apologize."⁷³⁷ Actual figures showed that 78% of all victims were female and that the overwhelming number of perpetrators were male.

MYTH: Homosexuality is a Mental Illness:

In 1935, Sigmund Freud responded to a worried mother regarding her son's homosexuality (though the letter wasn't made public until 1951):⁷³⁸

Dear Mrs. -----:

I gather from your letter that your son is a homosexual. I am most impressed by the fact that you do not mention this term yourself in your information about him. May I question why you avoid it? Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual development. Many highly respected individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty, too. If you do not believe me, read the books of Havelock Ellis.

Freud's understanding and his attitude concerning homosexuality is quite remarkable, considering the year in which the letter was written. It was not until the famous Kinsey research refuted the myths about male and female sexual behavior in the United States that a significant number of researchers started taking a fresh look at homosexuality. According to Dr. Vern Bullough:⁷³⁹

The Kinsey data was supported by the research of Dr. Evelyn Hooker, a psychologist, who in a carefully preselected sample of thirty male homosexuals, found that by any objective criteria, other than their sexual preference, these men could be classified as normal. Her findings forced a rethinking of the classification of homosexuality as a pathological illness, and later research has tended to confirm her findings.

In 1967, the National Association for Mental Health removed homosexuality from its list of mental illnesses.⁷⁴⁰ Within seven years, both the American Psychiatric Association and the American Psychological Association followed suit and de-classified homosexuality as a mental illness.⁷⁴¹ This change in psychiatric status has had a profound impact on the lives of lesbians and gay men.

One example of this impact can be gleaned from a memo written three years ago by the United States Attorney General's Office to the Acting Commissioner of the Immigration and Naturalization Service.⁷⁴²

This responds to your August 13, 1979 memorandum, concerning the legal authority of the Surgeon General to direct Public Health Service (PHS) medical officers not to certify arriving homosexual aliens as possessing a "mental defect or disease" solely because of their homosexuality.

The background to your questions is as follows: Congress has required under §212 of the Immigration and Nationality Act of 1952 . . . the exclusion of homosexual aliens from the United States. Enforcement of the Act's exclusionary provisions is a joint responsibility of the Immigration and Naturalization Service (INS) and the PHS. The INS performs examinations other than mental or physical examinations of all arriving aliens . . . and administratively adjudicates the admissibility of aliens in doubtful cases, 8 U.S.C. §1226. Upon referrals from INS officers, the PHS conducts physical and mental examinations of arriving aliens, and certifies "for the information of [INS officers], any physical or mental defect or disease observed" in aliens so examined. Since 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, e.g., relying on an alien's admission of homosexuality, and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a "mental defect or disease," i.e., homosexuality. You believe, however, that in the last several years, the number of referrals to the PHS has increased significantly.

On August 2, 1979, Dr. Julius B. Richmond, Surgeon General of the PHS and Assistant Secretary for Health of the Department of Health, Education and Welfare (HEW), issued a memorandum declaring that "homosexuality per se will no longer be considered [by the PHS] to be a 'mental disease or defect,'" and "the determination of homosexuality is not made through a medical diagnostic procedure," and indicating that INS officers will be advised to stop referring aliens to the PHS for mental examinations solely on the ground of suspected homosexuality.

You have questioned the Surgeon General's authority to make these determinations and have inquired concerning the effect of his memorandum on the enforceability of the Act. For reasons stated below we conclude:

- (a) Congress clearly intended that homosexuality be included in the statutory phrase "mental defect or disease," and the Surgeon General has no authority to determine that homosexuality is not a "mental defect or disease" for purposes of applying the Act;
- (b) If the Surgeon General has determined, as a matter of fact, that it is impossible for the PHS medically to diagnose homosexuality, the referral of aliens to the PHS for certification of homosexuality would be unhelpful;
- (c) The INS is statutorily required to enforce the exclusion of homosexual aliens, even though the Surgeon General has directed the PHS no longer to assist in this enforcement.

Because the Surgeon General has concurred with the American Psychiatric and Psychological Associations that homosexuality is not a mental defect or disease, the Public Health Service will not participate with the INS in so categorizing lesbians and gay men.⁷⁴³ The ability of the INS to act on its own in gay-exclusion cases, at least temporarily, has been suspended due to a federal court injunction.⁷⁴⁴

THE COMMISSION RECOMMENDS that members of California's congressional delegation support legislation [such as H.R. No. 3524, 97th Congress (1982)] to amend the Immigration and Naturalization Act to indicate that a person's sexual orientation neither shall be a bar to admission nor ground for exclusion under the Act. Exclusion and deportation of all known lesbians and gay men are not only reminiscent of "McCarthyism" but are inconsistent with the rights of American citizens to associate with lesbians and gay men from around the world. Furthermore, the continuation of this archaic policy detracts from our foreign policies on the subject of human rights. It is hard to rationalize America's "world vision" and international humanitarian concerns when our own domestic policies are riddled with violations of human rights such as the immigration policy under discussion.

MYTH: Contact with or Exposure to Homosexuals is Dangerous

Although homosexuality has been officially removed from the list of mental illnesses by all major psychiatric and psychological associations, as well as by the Surgeon General and the United States Public Health Service, it is seen by many persons as an undesirable condition. Some have articulated as their reasoning for considering the homosexual condition undesirable, that homosexuality is morally wrong. The rationale of others is still based upon the mental illness myth. Others more pragmatic and less judgmental simply note that homosexuality remains the basis for considerable discrimination in society and carries a significant social stigma. Persons holding all of these viewpoints may be in accord in the fear that personal contact with homosexuals is risky and dangerous for themselves and their children.

Three of the assumptions underlying these various viewpoints are: one, that homosexuality is threatening to the continuity of the species; two, that homosexuality is caused by contact with or exposure to homosexuals; and three, that the tradition of prejudice is perpetual and cannot be ended.

As for the perpetuity of traditional prejudice, the Commission believes that the self-destruction of prejudice is a natural by-product of the educational process; when individuals become aware of the facts about homosexuality and personally become acquainted with gay people, the old prejudices seem to evaporate. Often a first encounter with someone known to be gay occurs when a family member or an existing friend discloses his or her true identity after years of self-suppression due to fear of rejection. Although the immediate reaction may be shock, avoidance, or denial, generally the lesbian or gay man who "comes out" to family and friends is accepted with love. The family bond or the friendship is strengthened by the honesty in the relationship.

Homosexuality is not a threat to the survival of the human race; it has existed throughout history without an appreciable effect on the growth of world population. It does not appear that heterosexuals are transformed into "non-reproductive" homosexuals because of contact with lesbians and gay men any more than are right-handed people changed to left-handed because of contact with left-handed people.

Dr. Mary S. Calderone, in The Family Book About Sexuality, touched upon the "causes" of homosexuality:⁷⁴⁵

Both homosexuality and heterosexuality are to the best of our present knowledge programmed in some way during the first five to seven years of life. Those who have done a great amount of research in this field honestly say that the actual origins of heterosexuality and homosexuality still cannot be explained.

It does not appear to be a matter of heredity; neither has it been shown to be a matter of hormones - unless it should turn out to be something that happens before birth. If it were merely a matter of imitation, then there would be little or no homosexuality, because for centuries almost all people who are homosexual have come from heterosexual families. And research is now showing that the incidence of homosexuality among children brought up by a homosexual parent is the same or less as among children coming from heterosexual backgrounds.

Doctors Bell and Weinberg, in a mammoth research project on the development of sexual preference in men and women, had this to say about the effect parents can have on the sexual inclinations of their offspring:⁷⁴⁶

For the benefit of readers who are concerned about what parents may do to influence (or whether they are responsible for) their children's sexual preference, we would restate our findings another way. No particular phenomenon of family life can be singled out, on the basis of our findings, as especially consequential for either homosexual or heterosexual development. You may supply your sons with footballs and your daughters with dolls, but no one can guarantee that they will enjoy them. What we seem to have identified — given that our model applies only to extant theories and does not create new ones — is a pattern of feelings and reactions within the child that cannot be traced back to a single social or psychological root; indeed, homosexuality may arise from a biological precursor (as do left-handedness and allergies, for example) that parents cannot control. In short, to concerned parents we cannot recommend anything beyond the care, sympathy, and devotion that good parents presumably lavish upon all their children anyway.

Regarding the "biological" versus "psychological" debate about the cause of homosexuality, Bell and Weinberg noted:⁷⁴⁷

For years scientists have debated whether homosexuality is better attributed primarily to "nature" or to "nurture." Many psychoanalysts, for instance, are convinced that sexual preference is chiefly if not entirely the result of early childhood experiences with parents. And sociologists have generally attributed a homosexual preference to social influences outside the family circle or to various social learning influences. At the same time, however, there is a growing body of opinion that posits biological factors as the primary basis for sexual attractions. Even Sigmund Freud cautioned his colleagues to "bear in mind that some day all our provisional formulations in psychology will have to be based on an organic foundation. . . . It will then probably be seen that it is special chemical substances and processes which achieve the effects on sexuality."

That perspective has never been entirely absent from the field of psychiatry. Havelock Ellis and Krafft-Ebing, for example, regarded homosexuality as having a constitutional or hereditary origin. More recently, a growing number of psychoanalytically trained scholars have begun to question the widely held assumptions of their colleagues and to consider the possibility that prenatal hormonal influences have an important bearing on one's "sexual object-choice."

Many geneticists and psychophysicists as well assume that one must look to biological factors for explanations of homosexual development. Some contend that certain individuals are biologically programmed to become either homosexual or heterosexual, regardless of their social circumstances. Others take the less-extreme view that some individuals, given the right conditions, find it somewhat easier than most people to develop a pattern of homosexual responsiveness because of their biological make-up.

As this book goes to press [1981], the nature-nurture debate remains unresolved, among scholars as well as in the mass media.

With respect to the theory that people become homosexual because they are seduced by adults, Bell and Weinberg stated:⁷⁴⁸

Finally, the popular stereotype that homosexuality results when a boy is "seduced" by an older male or a girl by an older female is not supported by our data.

Although there is no consensus among researchers as to the cause or causes of homosexuality, a majority of the American public has a definite opinion on the "nature" versus "nurture" debate. A recent Gallup Poll indicated that "[A] majority of the public, 56 percent, believes homosexuality to be a product of upbringing and social environment rather than an innate predisposition — a view only 12 percent hold. Another 14 percent say both factors are involved."⁷⁴⁹

Undoubtedly, the debate over the causes of homosexuality will continue. In the meantime, we might all be guided by the few facts that most researchers do agree on. Dr. Betty Berzon has summed up these facts as well as anyone might:⁷⁵⁰

It is not known what determines a homosexual or heterosexual orientation. Many different possibilities have been studied, including genetic and pre-natal factors, hormonal makeup, and early learning experiences.

There is no conclusive scientific evidence that explains how sexual orientation is determined, but there is general agreement (a) that it happens very early in life, well before the age of five, (b) that individuals do not choose their sexual orientation, and (c) that a conscious choice to suppress behavioral expression of one's sexual orientation is possible but it is unlikely to be successful over a long period of time.

THE COMMISSION RECOMMENDS that the Legislature amend section 8050 of the Welfare and Institutions Code. That statute seems to be based on the "mental illness model" intertwined with the child-molestation myth, and directs the Department of Mental Health to "plan, conduct, and cause to be conducted scientific research into the causes and cures of sexual deviation, including deviations conducive to sex crimes against children, and the causes and cures of homosexuality . . ." Section 8050 should be amended to delete the phrase which has been underscored.

Putting lesbians and gay men in the same category as child molesters is not only inaccurate but also insulting and dangerous, perpetuating myths and encouraging bigotry. The connection with child molestation and the inferences which are made by this statute are uncalled-for and should be recognized as the product of a by-gone era.

The Commission's research indicates that neither the Department of Mental Health nor the Langley Porter Clinic is conducting research into the causes and cures of homosexuality. Notwithstanding the fact that this portion of the statute seems to remain unimplemented, the Commission strongly recommends that the Legislature delete the portion in question.

Law and education are the tools which can be used to end sexual orientation discrimination. Elimination of the portion of the statute discussed above will have at least symbolic significances in the law, indicating that the myths now underlying the section do not have official legislative sanction.

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MYTH: A Proper Justification for Sexual Orientation Discrimination
Is That Homosexuality Is Unnatural

The question of whether or not homosexuality is unnatural is one of the genre of debates which can never conclude with unanimity of opinion. The arguments on both sides are based upon personal and religious convictions as well as upon definition of terms.

When some people say that homosexuality is "unnatural," they are trying to point out that, in their opinion, it is "abnormal." When others say that homosexuality is "unnatural," they mean to imply that it is something that does not exist in "nature," that is, other animals do not engage in it. For others, calling homosexuality "unnatural" means that it violates God's law, which they say requires all sexual activity to be performed within marriage for the only valid purpose of sex, namely, procreation. For this last group, "unnatural" can be equated with "immoral." To attempt to address the claim that homosexuality is "unnatural," one must examine homosexuality from a cross-cultural and cross-species approach -- in both secular and theological contexts.

One might ask, "Why bother? Who cares what is natural or normal?" Elizabeth Canfield, a health and family planning counselor at the University of Southern California, recently wrote that in twenty years of involvement with counseling and education in human sexuality, "One consistent theme has been evident throughout: the preoccupation [by persons seeking such counseling] with what is normal and what is natural."⁷⁵¹ It seems that concern for what is "natural" or "normal" is about as widespread as the concern for what the neighbors might think.

While the Report will indulge in some discussion of what some have said about the "unnatural" issue, the Commission itself has no unanimity even as to the meaning of the word in this context; the issue is an academic one. It is the position of the Commission, however, that whatever conclusion one reaches, there is no justification or excuse for discrimination or for any denial of equal opportunity in society or equal justice under law.

As to the academic question of what is normal sexual conduct in the human species, much has been written. Published statistics have shown what certain researchers have found prevalent in the areas of masturbation,⁷⁵² oral sex,⁷⁵³ and homosexuality.⁷⁵⁴

Looking at normality from a statistical point of view within the human species, Dr. Wardell Pomeroy wrote:⁷⁵⁵

Statistically speaking, well over 85 percent of us engage in one form or another of nonmarital intercourse — premarital, extramarital, or postmarital.

What is normal sexual behavior? Almost anything, according to statistics, except pedophilia and rape. Normal is as normal does.

Labeling someone "abnormal," without attaching other value judgments, really tells us little about the individual. People who are geniuses or people who are celibate, for example, are statistically "abnormal."

Dr. Pomeroy also addressed the cross-species aspect to the question of unnaturalness:⁷⁵⁶

Let's try another approach toward a definition of sexual normality. From grade school on, we have it persistently drummed into our heads that human beings are a species of animal — specifically, mammals — and during the rest of our lives certain aphorisms ("Man is a rational animal.") are tossed at us whenever we act as though we have forgotten the fact. Since we are mammals, we can ask ourselves how our sexual behavior compares with that of other mammals: How is our behavior like theirs, and how does it differ? This is the phylogenetic definition of sexual normality: Sexual behavior natural to mammals is sexual behavior we're likely to be engaged in.

Among mammals, other than the human variety, monogamy is the equivalent of marital status (we alone have benefit of law or clergy), and in this respect, as mammals, we are distinctly abnormal and unnatural. Most mammals do not have one mate for a long period of time.

On the other hand, masturbation, homosexuality and mouth-genital activity are common to almost all species of mammals; . . . by phylogenetic definition, there is almost nothing that humans do sexually that isn't part of their mammalian nature and heritage.

Dr. Pomeroy then notes that the other approaches to defining normality — social, legal, and moral — depend upon "the Judeo-Christian code of ethics and the bodies of law that have been built upon it."

Dr. Wayne Dynes, coordinator of the Scholarship Committee of the Gay Academic Union in New York City, had this to say about the origins of the myth that homosexuality is unnatural:⁷⁵⁷

The concept of the natural, the parent idea, is extremely complex. Despite its seemingly self-evident status, the concept of nature is in fact culture-bound, reflecting a number of characteristic Greek preconceptions, especially as they emerged during the philosophical efflorescence of the fifth and fourth centuries B.C. Nature may sometimes be taken to refer simply to everything, and is therefore equivalent to the universe or "reality"; this is the all-embracing or expansionist concept of nature. Conversely (and sometimes simultaneously, by way of an unobserved paradox that often strips the arguments of their logical cogency), a narrower concept may be preferred, whereby certain aspects of the whole of reality are given a preferred status, e.g. (1) the earth and growing things; (2) things that are not man made or artificial — the Greek physis-techne contrast; (3) some special shaping principle or force within the whole corresponding to the natura naturans of the medieval philosophers. There are other confusing aspects. Thus, "natural law" is properly used to refer to a distinct legal tradition, first elaborated by the Romans and various inflected in succeeding centuries, but it subliminally suggests the body of observed regularities determined by science, which is quite a different matter.

The unnatural, to turn now to the antonym, was given its special application to sexual conduct by Plato, who contrasted it with nature as the norm to which human beings must adhere. According to The Laws (I and VIII) natural sexual acts are only those between male and female that can lead to procreation. This restrictive concept entered Christianity through the famous discussion in Romans I: 26-27, which is responsible for the permeation of our legal tradition by the phrase (crime) "against nature."

The difficulties of applying the natural-unnatural antithesis to sexual conduct may be summarized as follows. If nature is truly all-embracing, it is impossible to depart from it. Only things that do not exist at all, such as centaurs or phlogiston, would be unnatural. This criterion provides no means whatever for separating existing, but illicit acts from existing licit ones. If, however, some things within the world are regarded as natural and others not, the dichotomy becomes culture bound and subjective. Thus, clothing, cosmetics, and machinery have often been stigmatized as unnatural. Then it is hard to see how a life-saving operation against cancer can be regarded as other than an unnatural intervention in otherwise inevitable processes. In short, opponents of "unnatural" sexual conduct need to demonstrate that they have at their disposal a unified-field theory of the natural and its opposite. Because of contradictions built into the conceptual heritage this is impossible -- at least without altering some of the most central features of our technological civilization. The label of unnatural, then, turns out to be a snarl word that cannot fit comfortably into any developed system of rational thought.

The religious philosophical basis of the assertion of unnaturalness -- and its inherent contradictions and flaws -- have been the subject of a number of scholarly articles.⁷⁵⁸ It should also be noted that this philosophy does not inhere in the theology of all major Christian denominations.⁷⁵⁹ On a more relevant note, it should be pointed out that even some religions that hold the view that homosexuality is sinful (or that had not yet decided the issue), nonetheless take a stand in favor of legislation to decriminalize private sexual conduct between consenting adults and to end sexual orientation discrimination in employment, housing and public accommodations.⁷⁶⁰

Dr. Michael Valente, a noted Catholic theologian, suggested to the Commission that there was great significance to the position of the Catholic Church on the "rhythm" method" as a legitimate form of birth control. According to Dr. Valente, when the Church accepted the rhythm method as a non-sinful practice, it necessarily acknowledged the legitimacy of engaging in sexual relations that would not be procreative. From this, a branch of Catholic theology has developed which accepts as non-sinful various loving, responsible relationships, both heterosexual and homosexual in orientation.⁷⁶²

This section of the Report was purposely not entitled: "Myth: Homosexuality is Unnatural." But, rather, the title chosen implies that the academic, religious, and intellectual arguments on both sides of the "unnaturalness" issue provide no useful rationale for justifying discrimination. The Commission recognizes that gay men and lesbians do exist and are not an insignificant element of society. The Commission also recognizes that society must deal constructively with this reality and that it is not useful, but, rather, destructive, to deny equal opportunity and justice on the basis of academic and unanswerable questions.

Ironically, the ultimate loss accrues to the society when discrimination limits a group's participation, thus yielding less than the full potential of the human resources of the state. This harm to society is the product of not only the myths discussed above, but also of the many other myths and stereotypes not explored in this Report, including the myths that homosexuality causes the downfall of civilizations; that homosexuals have gender confusion, lesbians acting masculine and gay men effeminate; and that homosexuals are promiscuous and are proselytizers.

Society has felt the impact of drawing negative generalized characterizations of entire racial and ethnic groups in the past. Those types of generalizations are no more useful and no less destructive in the case of those with a minority sexual orientation. The debates about the truthfulness of the generalizations may go on forever. Our form of government, our state and federal constitutions, and the collective conscience and intelligence of our society, all require justice and fair-play in the meantime.

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ACTUAL MANIFESTATIONS OF DISCRIMINATION

This section of the Report will document the forms in which sexual orientation discrimination manifests itself. Day-to-day problems and practical solutions will be the primary focus here.

Violence Against Lesbians and Gay Men

Physical violence against the person of another is the most serious, and sometimes deadly, form of personal privacy invasion that one could commit. Unfortunately, it is not uncommon for such violence to be committed against lesbians and gay men on account of their sexual orientation, and the problem is local, statewide, national, and international in scope.

The Society for the Psychological Study of Social Issues (a division of the American Psychological Association) formed the Task Force on Sexual Orientation to gather reliable information, from a scientific perspective, on homosexuality and to prepare educational materials on this subject. The final report of the Task Force was approved as an official publication of the Society on August 23, 1981. The Task Force documented the following conditions facing gay people in modern America:⁷⁶⁵

(1) Patterns of thought control inhibiting open education, research, and the free exchange of ideas concerning homosexuality.

(2) Widespread misinformation and ignorance about homosexuality.

(3) A widespread pattern of discrimination and violation of constitutional rights, especially in terms of due process, equal protection, free speech and assembly, and freedom of religion.

(4) Widespread violence, both in random attacks and in organized violence. This has included destruction of Gay churches, newspapers and community institutions.

In addition to underscoring the fact that violence against lesbians and gay men in this country is widespread, the Task Force on Sexual Orientation was able to show how the violence is linked to ignorance. Homophobia, constantly fed by myths and generalizations about gay people, is at the root of the violence. Lack of education about homosexuality as a topic and lack

of understanding about lesbians and gay men as people simply perpetuate the violence and other forms of sexual orientation discrimination.

Dr. William Paul, coordinator of the APA Task Force, testified at the Public Hearing of this Commission held in San Francisco. He stated:⁷⁶⁶

My name is Bill Paul — I'm the research coordinator for the Task Force on Sexual Orientation, Division Nine of the American Psychological Association. This is a four-year task for research and education that was mandated by Division Nine for the Society for the Psychological Study of Social Issues.

The purpose of the task force is to gather information from current research that relates to homosexuality as a social issue. This has involved thirty-one researchers over a four-year period. I don't want to give you the entire summary of our findings . . . rather, there is a certain range of data that relates to the work of the Commission. I'd like to talk about these findings as they apply to California and to your Commission. . . .

The conditions that we have found include widespread discrimination on the basis of sexual orientation, especially in terms of due process and equal protection of the law. There are also widespread examples of invasion of personal privacy. One of the most dramatic aspects of these forms of discrimination and violation of personal privacy is violence. Now this violence transpires in random attacks against target groups and also tends to spill over into violence against people who don't necessarily belong to these groups. So, for example, in San Francisco, there was the bombing of the Women's Building this last year. The Women's Center is a center of feminists, but also is a center for the lesbian community. And it was very hard to distinguish whether lesbians or women were being attacked. But the women's community denied any attempt to isolate lesbians as a target group. An attack on women or any woman was considered an attack on all women. Certainly, in this case, the feminist community was the target group.

Now the content of this hate-campaign is worth consideration. We've done an analysis, both in terms of content and themes. We find clear comparisons to Nazi propaganda and certainly to classical racism in the United States. I think the best comparison is to anti-Semitism.

And there are certainly verbatim quotes, for example from Anita Bryant in 1977, referring to gay people: "They can't reproduce, so they must recruit." Well, there's almost an identical quote from Heinrich Himmler in 1940 when he was the head of the S.S. What we find in the propaganda are certain categories of argument: "It's against natural law." -- "It's a personal disorder." -- "It's a social disorder leading to the destruction of the family, or the decline of civilization." -- "It's a moral and religious violation of basic moral ideas in this society." Finally, social utility arguments that we predicted would become much more predominant, and these are seen as extremely powerful as seen in the Palo Alto campaign recently: "It's not really a social issue -- these people aren't really a minority -- furthermore they don't have to do this; they bring it on themselves." -- "It's a personal matter, best kept private." At the extreme end of this argument, it comprises a kind of victim-baiting so that "there wouldn't be violence, if they didn't flaunt what they do." -- "They bring it on themselves." -- "There's no reason why there should be an issue, because after all, if they just kept to themselves, they'd be okay." . . .

. . .

We should not, I think, assume that the prejudice or the bias is so deep that nothing can be done about it. It has been shown that prejudice or hatred towards homosexuality and toward lesbians and gay men are, in fact, patterns of thought that correlate with ignorance: a lack of education.

Violence against lesbians and gay men on account of their sexual orientation generally stems from the same basic causes regardless of the jurisdiction in which the violence occurs. Anti-gay violence is an international problem which seems to be inextricably connected with religious

dogma. In Britain and the United States, it stems from a common Judaeo-Christian tradition of hostility to lesbians and gay men. Most of our anti-gay criminal laws had their origin in Britain. It was not until England decriminalized private homosexual conduct that this trend spread to the United States.

Some of the causes and dynamics of violence against gay people were addressed in a report of the Commission on Discrimination of the Campaign for Homosexual Equality in London, England. The report was published in 1980 and entitled Attacks on Gay People.

Because of the great parallel between the United States and Britain in the reaction to and treatment of gay people, a few observations from the above-mentioned report are printed here:⁷⁶⁷

[T]here is a systematic pattern of violence which stems from generations of conditioning to fear homosexuality; this is made worse by the "closet" in which many people feel obliged to conceal their gayness. . . . Anti-gay violence may be as bad as the worst examples of racist violence. . . .

Many serious crimes go unreported because the victims fear -- and not without reason -- that they will themselves be on trial (sometimes literally) for their gayness, though they may have done nothing wrong. In other cases, the police and the press may agree to suppress the anti-gay nature of the attack. The reasons for this vary widely, from protecting victims' or relatives' social status to reducing the pressure to mount a thorough investigation.

. . . When a man or a woman is labelled "queer," the unthinkable becomes feasible. The language exaggerates a real or imagined difference, dehumanizing the person against whom it is used, diminishing the humanity of the person who applies it to the point where violence seems to be a reasonable course of action. . . . These cases show how people are or may be stereotyped from limited information, and how this may lead to violence.

Coming Out is a vital part of gay resistance to violence. Although it may lay a few people open to attacks, it also makes for easier self-protection and stronger mutual support. In the longer term it is essential to break down stereotypes and re-educate society by coming out. . . .

Brian Miller and Laud Humphreys have conducted the largest study to date on lesbians and gay men in the United States who are victims of assaults and murders. In their paper, "Lifestyles and Violence: Homosexual Victims of Assault and Murder," Miller and Humphreys note a dearth of serious scientific literature on this subject. Generally, the studies which have been conducted in the past have involved extremely small samples and have been riddled with the authors' subjective homophobic conclusions.

The data for the Miller-Humphreys study came from three sources: Miller's 1978 study of 50 homosexual fathers; Humphreys' 1975 study of 50 men observed in "tearooms"; and their joint study (1973-1977) of 161 gay murder victims. The Miller-Humphreys study sample included "only those cases where the crime was related to the victim's homosexual lifestyle."⁷⁶⁸ They "excluded from the sample all cases where the nature of the lifestyle was not indicated or where the degree of the victim's homosexual identity was unclear."⁷⁶⁹ They "retained 52 cases of individual Canadian and American homosexual murders for which the data were adequate to assess the victim's lifestyle."⁷⁷⁰ Miller and Humphreys developed a test to measure the victims' relative openness of homosexual lifestyle along a covertness-overtiness continuum. Some of the findings and conclusions reported by Miller and Humphreys follow:⁷⁷¹

Most [63.5%] of the homicide victims studied were thus characterized as maintaining a highly covert lifestyle. These men were not well known to the gay community, and gay newspapers generally discovered their homosexuality only through sources external to both the community and the victims. We refer to these victims as "homosexual marginals." . . .

We have noted that the relatively covert men, marginal to the gay culture, comprise the majority of victims in our homosexual murder study. Thirty-six percent of these homosexual marginals were heterosexually married at the time of their death. There are no available data on the number of others who had been married at some earlier time. A third of these homosexual husbands were killed while away from home on a business trip, by male hustlers or hitchhikers they had picked up.

Evidence from Miller's study of homosexual fathers corroborates findings of the homicide investigation. Respon-

dents in his research who report the greatest victimization are also those who score lower on the overtness scale. In contrast, gay fathers who rank high on this index (generally those no longer living with their wives) report little victimization. Presently married homosexual men, participating in furtive sex, experience more "close calls" in this regard. Additionally, these men tend to lack both knowledge about the gay world and social skills necessary to operate effectively in it. . . . In brief, these men are peripheral to the gay culture.

Lacking the knowledge, skills, domestic arrangements, and time to interact successfully in the gay world, respondents turn to more freelance methods of acquiring homosexual partners.

As our homicide data reveal, these marginal methods sometimes have fatal results. . . .

Operating on the periphery of gay institutions and social networks offers these men little support and protection. Conventions of interaction are more ambiguous and thus more subject to misinterpretation. Covert homosexuals on rigid time schedules and feeling uncomfortable about their sexual desires may not take the time to play the waiting games of cruising nor cool-headedly negotiate expectations. . . .

The pressured, rushed activity of homosexual marginals may sabotage their aim of obtaining safe sex, particularly if they are imprudent in their hasty sexual approach. Partners may respond violently if they perceive they are being dealt with in an aggressive or perfunctory manner. . . .

Respondents in the homosexual father study report assaults by "gay-bashers," theft of their autos, and being robbed by hustlers. . . .

Being victimized is often cause for guilt, but being victimized in the course of pursuing socially devalued goals produces concomitantly greater guilt and shame. Many homosexual father respondents seriously confronted their homosexuality for the first time as a result of suffering criminal victimization. In being attacked, they did not so much come out of the closet as have the closet involuntarily

ripped from around them. Such unanticipated exposure may be psychologically devastating. Two homosexual fathers, for instance, reported having considered suicide after such experiences.

Homosexual fathers' pain of victimization is heightened by the perception of being powerless to right the wrong, thus being multiply victimized. These respondents felt constrained from seeking medical attention for the wounds, although some sought therapy for emotional difficulties resulting from the attack. Few reported the incident to police, since they lacked identifying information on the offender and believed the case to be unsolvable. Others avoided reporting because they perceived the police to be unsympathetic. . . .

In the homosexual as in other worlds, marginals tend to be thrown into interaction with other marginals. Those who occupy the more central arena of the gay culture tend to find both social and affectional opportunities in friendship groups and relationships with lovers and move in a network of gay institutions. Homosexual marginals, on the other hand, are more apt to spend leisure time in the company of runaways, derelicts, drug abusers, and hustlers encountered in bus terminals, all-night coffee shops, or on the streets.

Given this differential association, it should not be surprising to discover that 64% of the homosexual marginals in the victimization study were murdered by pickups and hitchhikers, most of whom could be identified as hustlers by references in the data to the exchange of money. Only 37% of the offenders against those who scored high on our overtness index could be classified as pickups.

Forty-two percent of those victims with a more overt gay lifestyle were killed by "gay-bashing" gangs or groups of bikers. Only 12% of the homosexual marginals were murdered by such marauders. Because such anti-gay gangs seek victims in areas known to be frequented by gays -- areas which marginals often avoid for fear of exposure -- they are likely to find the more openly identified gay men in these locales.

Hustlers, although less obviously predatory or homo-

phobic than gay-bashers, may react with ambivalence towards their own sexuality and with rage toward their sexual partners. . . . The extent and severity of hustlers' criminal careers is important in terms of dangers they pose to the relatively isolated, homosexually unskilled, often desperate men who seek them out for sexual services.

Humphreys' interviews with street hustlers over a ten-year period reveal that a third of them report being sexually assaulted during the incarceration that nearly all experienced. With no programs of therapy offered in the nation's institutions for victims of jail rape, it is not surprising that those thus victimized occasionally react in rage towards furtive, frightened, and sometimes insensitive sexual partners.

That intense rage is present in nearly all homicide cases with homosexual victims is evident. A striking feature of most murders in this sample is their gruesome, often vicious nature. Seldom is a homosexual victim simply shot. He is more apt to be stabbed a dozen or more times, mutilated, and strangled. In a number of cases the victim was stabbed or mutilated even after being fatally shot. . .

Findings of the research confluence reported in this paper suggest a need for further examination of lifestyle impact on susceptibility to victimization. Our data indicate that lifestyles minimizing overtness structurally limit homosexual opportunities to clandestine sex with demonstrably dangerous pickups in unprotective settings. Such conditions leave the way open for attack by criminal opportunists who would exploit the secrecy. Homosexually marginal lifestyles also reduce the possibility of establishing intimate relationships within the more safeguarded gay culture.

Moral entrepreneurs and other agents who promote social conformity prescribe that homosexuals get married, settle down family-style, and fit in. For married homosexuals who are unable to relinquish same-sex activity, this prescription directs them to a singularly risky lifestyle. The homosexually oriented person who tries to escape stigmatization by fleeing into a covert lifestyle may become trapped in an even more fearful situation. What he may gain in avoidance of stigma, he loses in susceptibility to crime victimization.

Evidence indicates that anti-gay violence is a serious national problem. "Marginal homosexuals" who are often married and who attempt to lead a double-life, desperately avoiding contact with openly gay persons and generally keeping away from gay establishments, are often victims of violent attacks perpetrated by pickups. Openly gay people are not infrequently victims of violent attacks, generally by "queer-bashing" individuals or gangs. Anti-gay attacks are so widespread in some major cities that organizations have developed to monitor the cases; other groups offer self-defense classes for lesbians and gay men.⁷⁷² Such attacks became so prevalent in New York City that the City Council there unanimously adopted a resolution condemning anti-gay violence.⁷⁷³

Mr. Richard Gayer, a San Francisco attorney and coordinator of the Safe Streets Committee, provided this Commission with details regarding attacks on gay people in a section of San Francisco during 1974 to 1976.⁷⁷⁴ The report, Attacks on Gay People in the Eureka Valley, documents the date and time of the attack, the name of the victim, the event and the location of the incident, the names of the attackers (if known), and what action, if any, was taken by the police, prosecutors, and courts.

Thirty-eight incidents of anti-gay violence were documented by the Safe Streets Committee. Victims were "struck with tire iron and beer bottle," "attacked with belt and a brick," "beaten," "thrown to ground and kicked," "stabbed in the groin," "kicked and thrown through store window," "threatened by a man waving a hatchet," "punched in the face," "attacked with screw drivers," "beaten with steel rod," "shot with pellet gun," and "beaten with steel bars."⁷⁷⁵ Gay victims suffered broken jaws, broken noses, fractured skulls, loss of teeth, and other major injuries.⁷⁷⁶

The Commission on Crime Control and Violence Prevention was established by the California Legislature in 1979. That Commission was charged with the investigation of the root causes of violence, and the identification of preventive, proactive measures.⁷⁷⁷

At a public hearing conducted by that Commission, held in Oakland during May, 1981, testimony was presented regarding "Homophobia and Violence Against Lesbians and Gays."⁷⁷⁸ The staff of the Commission on Personal Privacy has reviewed the Preliminary Report of the Commission on Crime Control and has noted an absence of any reference to violence against lesbians and gay men. Research material and references regarding the causes of discrimination against gays, including violent attacks, which was gathered

by the Commission on Personal Privacy, has been shared with the Commission on Crime Control, with the purpose of encouraging significant mention and discussion of violence against lesbians and gay men, as well as the dynamics of homophobia, in the final report of the Commission on Crime Control when it is issued in early 1983.

Violent attacks against lesbians and gay men are phenomena which have barely been acknowledged by our society, notwithstanding the fact that such violent manifestations have existed in American culture since the very founding of this country. Often, this violence is the continuation of more than fourteen centuries of deliberate attempts to eliminate the visible presence -- if not the existence -- of gay people as individuals and as a class.

Education and training of law enforcement personnel in this state as to both the existence and the dynamics of anti-gay violence need to take place. Police officers, prosecutors, and probation officers need to be properly equipped to handle this most devastating form of discrimination. Lesbians and gay men need to feel secure that when they report incidents of violence to law enforcement personnel they will be received with genuine interest and sensitivity.

THE COMMISSION RECOMMENDS that the Commission on Peace Officer Standards and Training (P.O.S.T.) develop and certify programs on the handling of cases involving violence against lesbians and gay men for use at academies, basic training, and advanced officer training. P.O.S.T. should develop resource and training materials on this subject.

THE COMMISSION RECOMMENDS that the Department of Justice and local law enforcement agencies incorporate into existing procedural handbooks or training materials used for sexual assault cases, sections suggesting sensitive interview approaches and procedures in cases of violence directed against lesbians and gay men. This could serve as a guide for all officers in the state when victims report such violent attacks.

In researching existing remedies to combat violence and intimidation, the Commission discovered section 51.7 of the California Civil Code:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

Section 52 of the Civil Code provides a minimum of \$10,000 in damages for persons who successfully prove that they were victims of violence for one of the reasons enumerated in the aforementioned statute.

THE COMMISSION RECOMMENDS that "sexual orientation" be added to the protected classifications mentioned in section 51.7 of the Civil Code. Lesbians and gay men need the help of the California Legislature to combat violence and intimidation directed at them because of their sexual orientation. A strong signal needs to be sent to would-be perpetrators of such that it will not be condoned. The Commission has also noted the absence of "age" and "disability" from this anti-violence statute. It is common knowledge that elderly and disabled persons are often targeted for violent attacks by would-be robbers because they are believed to be easy prey. The Commission finds that the personal privacy and physical security of elderly and disabled persons would be strengthened by further amending section 51.7 to include the terms "age" and "disability." The Commission therefore recommends that in addition to "sexual orientation," the terms "age" and "disability" be added to section 51.7.

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Sexual Orientation Discrimination in Employment

After physical safety, it seems that equal employment opportunities and job security have the highest priority for lesbians and gay men in California. Sexual orientation discrimination in employment settings has been studied by this Commission; the Commission heard from witnesses who have experienced such employment discrimination and from labor relations experts who were consulted as to legal protections which currently exist as well as potential changes in the law. This section of the Commission's Report is designed to review the current state of the law regarding employment discrimination and to focus on areas in which changes are appropriate.

This section will be divided into a discussion of sexual orientation discrimination in public employment and in private employment, with the former being divided into federal, state, and local government jobs. A detailed memorandum of the State Personnel Board regarding its implementation efforts is also included in this section.

Employment in the Federal Government

Prior to 1975, the federal government had a general policy of excluding lesbians and gay men from the civil service. As was discussed earlier in this Report, in the Fifties, due to purges stimulated by congressional hearings on the subject of "Employment of Homosexuals and Other Sex Perverts in Government," a multitude of gay persons were either discharged from the civil service or dissuaded from applying. The employees who remained often had to lie about their sexual orientation and to lead double lives. One can only imagine the psychological stress under which gay civil servants lived and worked during this period.

In the mid-Sixties, the Civil Service Commission was almost forced to defend its homosexual-exclusion policies before the United States Supreme Court. William Dew, an air traffic controller, was discharged from his position with the F.A.A. due to pre-employment homosexual activity. The activity had actually occurred 13 years previous to his job with the F.A.A., when he was an adolescent. After being dismissed, Dew sued the F.A.A. and the Civil Service Commission, seeking reinstatement. He lost in the federal district court and the United States Court of Appeals affirmed the dismissal.⁷⁷⁹ The United States Supreme Court decided to hear the case and

granted certiorari.⁷⁸⁰ Rather than defend its position before the high court, the Civil Service Commission reinstated Dew with back pay.⁷⁸¹ Therefore, the Supreme Court dismissed the case as being moot.⁷⁸² After gay individuals and gay organizations continued to sue the federal government for its exclusion policies and eventually won a few cases, the Civil Service Commission finally decided to abandon its ban on gays in federal positions.

In July 1975, the United States Civil Service Commission issued new guidelines for evaluating the suitability of individuals for federal employment.⁷⁸³ The guidelines changed the total exclusion policy to a policy based on exclusion only for evidence of unfitness:⁷⁸⁴

Court decisions require that persons not be disqualified from federal employment solely on the basis of homosexual conduct. . . . The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunctions, while a person may not be found unsuitable based upon unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.

The first person to formally receive the benefit of this new ruling was John Singer. Singer had worked as a clerk-typist for the Equal Employment Opportunity Commission in Seattle. Singer had been fired because of conduct engaged in by him in 1971 and 1972: having a gay-rights bumper sticker on the car which he drove to work; showing open affection to his male friends in the cafeteria and near the elevator at work; filing a lawsuit in an attempt to secure a same-sex marriage license; and making negative remarks in a newspaper article about the "closet queens" at work. Singer was fired under the old policy requiring the blanket exclusion of all homosexuals. His dismissal was upheld by the United States Court of Appeal for the Ninth Circuit. After Singer sought review by the Supreme Court, the Solicitor General of the United States asked the Court to grant certiorari and to summarily remand the case back to the Civil Service Commission for redetermination of Singer's suitability under the new regulations and guidelines. The Court took the action requested by the Solicitor General.⁷⁸⁵

After reconsideration of its previous ruling, on October 13, 1977, the Commission again decided to terminate Singer, although the decision was based on the new guidelines. The Federal Employee Appeals Authority rescinded that decision and remanded the case for further consideration, finding that the Commission's new decision was in violation of its own suitability standards. The Commission became exhausted with the case and reinstated its previous decision as its final decision. Singer appealed.

The Federal Employee Appeals Authority again accepted jurisdiction, stating the standards under which Singer's conduct would be judged:⁷⁸⁶

- (1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or
- (2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

After reviewing Singer's job record, the Appeals Authority found that although the public generally would not approve of his conduct, Singer's good job performance would prevail. Singer was ordered reinstated.⁷⁸⁷

Further changes have occurred at the federal level regarding the employment of lesbians and gay men. On May 14, 1980, the Washington Post reported new federal rules regarding fair treatment and privacy for gay employees or job applicants:⁷⁸⁸

In a major boost for gay rights, the Carter administration has forbidden government officials from inquiring into the sexual habits of employees or individuals seeking most federal jobs.

The directive will be delivered to agency and department heads this week. It also required the government to count, as work experience, service as an unpaid volunteer in homosexual-related civic projects, such as community task forces on problems of homosexuals, or service with a gay legal or medical clinic.

Federal agencies already take into account volunteer service in other community activities when rating the experience of potential employees to determine their pay and

grade level.

Alan K. Campbell, President Carter's chief adviser on the federal bureaucracy, signed the order Monday, although few federal officials know of its existence. Campbell and top White House aides consulted with federal personnel officials, legal experts and with leaders of the homosexual community.

The new order covers most federal agencies and departments that employ about 95 percent of the government's 2.7 million workers. Officials say the changes are in line with recent court rulings that have outlawed work-place discrimination against homosexuals, and/or unmarried persons living together.

It has been an unwritten practice in many federal agencies (and private firms) to check up on alleged homosexuals, and to deny them employment or promotion either on "moral" or security grounds.

The new order will make it illegal for agencies to inquire into non-job-related sexual, social or other habits of employees.

The memorandum referred to in the news article was issued by Alan K. Campbell, Director of the Office of Personnel Management [OPM]. It was intended to advise agency heads of OPM policy on provisions of the Civil Service Reform Act of 1978, specifically regarding the section of the Act which "prohibits any employee who has authority to take personnel actions from discriminating for or against an employee, or applicant for employment on the basis of conduct which does not adversely affect either the employee's own job performance or the performance of others."⁷⁸⁹ The OPM Directive had this to say about privacy and sexual orientation:⁷⁹⁰

The privacy and constitutional rights of applicants and employees are to be protected. Thus, applicants and employees are to be protected against inquiries into, or action based on, non-job-related conduct, such as religious, community, or social affiliations, or sexual orientation. An applicant or employee is also to be protected against any infringement of due process, self-incrimination or other constitutional rights.

The Department of Defense is not covered by the reforms brought about

by the new Civil Service Commission rules, the Civil Service Reform Act of 1978, or the OPM Directive previously discussed. The Department of Defense is the umbrella agency under which the Army, Navy, Marine Corps, and Air Force operate. The Defense Department is also responsible for investigating, granting, and denying security clearances which are often required for private-sector employees within firms doing defense work.

The armed services exclude and discharge from the military departments any persons who engage in homosexual acts or who have homosexual tendencies.⁷⁹¹ The Defense Department also has a policy of denying security clearances to known homosexuals, although administrative hearing officers often order the clearances granted when applicants appeal from the denial.⁷⁹²

Probably the most famous gay-military case was that involving Air Force Sergeant Leonard Matlovich.⁷⁹³ After becoming aware of his homosexual preferences, Matlovich so informed his superiors. As a result, the Secretary of the Air Force directed that he be discharged. This was done on October 22, 1975. Matlovich instituted suit in federal court for reinstatement. The federal district court denied the relief.⁷⁹⁴ The United States Court of Appeal reversed the lower court on a technicality. The Air Force policy on exclusion, like that of all other military departments, calls for the exclusion of known homosexuals, although in the discretion of the department, exceptions can be made. In the Matlovich case, the Secretary of the Air Force declined to make an exception without stating the reason for his decision. Because the rationale for not granting an exception was never articulated by the Air Force, the Court of Appeals was at a loss to determine whether any unconstitutional criteria was used in denying an exception. After the case was remanded for further consideration, Matlovich entered into a monetary settlement with the Air Force and dropped his case, thereby leaving the constitutionality of the overall exclusion policy unsettled.

The constitutionality of the military's policy of excluding persons who have engaged in homosexual conduct was recently decided by the United States Court of Appeals for the Ninth Circuit.⁷⁹⁵ Limiting its decision to the policy of excluding military personnel because they engaged in homosexual conduct while they are in the service (without deciding the constitutionality of discharges based on homosexual status or homosexual conduct committed prior to enlistment), a unanimous three-judge panel held:⁷⁹⁶

The nature of the employer - - the Navy - - is crucial to our decision. . . . Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities. . . .

The Navy's blanket rule requiring discharge of all who have engaged in homosexual conduct is perhaps broader than necessary to accomplish some of its goals In view of the importance of the military's role, the special need for order and discipline in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, however, we conclude that at the present time the regulations represent a reasonable effort to accommodate the needs of the Government with the interests of the individual.

Upholding the challenged regulation as constitutional is distinct from a statement that it is wise. The latter judgment is neither implicit in our decision nor within our province to make. . . .

In addition to discharge proceedings, the authority of the military to court martial an enlisted person for engaging in private homosexual conduct while in service has recently been upheld by a federal court.⁷⁹⁷

Discharge proceedings based solely on homosexual status or homosexual tendencies are now constitutionally suspect due to a recent federal district court decision which was not appealed by the Army.⁷⁹⁸

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The State of California as Employer

The State of California employs approximately 300,000 government workers.⁷⁹⁹ Based on the estimates given earlier in this Report, one could expect that about ten percent, or 30,000 state government workers are lesbians and gay men.

A meaningful program to end any form of employment discrimination requires three ongoing and sometimes overlapping processes: (1) the establishment of strong and clear protective policies; (2) a comprehensive educational program and effective complaint process to implement the protections; and (3) systematic monitoring of policy statements, enforcement mechanisms, educational programs, and the actual processing of complaints.

The Commission has reviewed the state personnel system to determine how sexual orientation discrimination is presently being handled with respect to these three essential components: protective policies, implementing mechanisms, monitoring programs.

Protective Laws and Policies

On May 6, 1971, at its meeting in Los Angeles, the Fair Employment Practices Commission voted not to accept "homosexual" complaints.⁸⁰⁰ The Department of Fair Employment and Housing derives its authority to handle employment discrimination complaints from specific legislative enactments. The California Legislature has not added "sexual orientation" to the employment discrimination responsibilities of the Department of Fair Employment and Housing, notwithstanding the fact that bills have been introduced to achieve this result.

Until 1979, there was no state agency specifically charged with the responsibility to investigate and remedy complaints alleging discrimination based upon sexual orientation. Similarly, there was no clearcut legal authority even giving lesbians and gay men a private cause of action against the State of California when it, as an employer, engaged in such discrimination.

On April 4, 1979, Governor Edmund G. Brown Jr. issued an executive order prohibiting sexual orientation discrimination in state employment.⁸⁰¹ This landmark order stated:⁸⁰²

WHEREAS, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

WHEREAS, government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; and

WHEREAS, California must expand its investment in human capital by enlisting the talent of all members of society;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

The agencies, departments, boards, and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution.

Within two months after the Governor had signed this order, the five-member State Personnel Board [SPB] heard testimony from representatives of the lesbian and gay community regarding the implementation of this protection.⁸⁰³

On July 5, 1979, Duane D. Morford, Chief of the Policy and Standards Division of the SPB, issued a memo to "All State Agencies and Employee Organizations" informing them of the existence of the Governor's Executive Order and of some of the SPB's plans to implement that order.⁸⁰⁴ On August 13, 1979, Mr. Morford, on behalf of the SPB, issued a revised "Basic Directions for Qualifications Appraisal Panel Members" (QAP) to SPB technical staff, as well as affirmative action officers, departmental personnel officers, and departmental women's program officers in all departments under SPB jurisdiction.⁸⁰⁵ One purpose of the revised directions was to inform persons involved in the QAP process that sexual orientation discrimination in state employment was now illegal. The QAP procedure includes oral interviews which are a routine part of the hiring process. QAP interview panels consist of three persons who question and score job applicants. Part of the QAP training process includes instructions to potential panel members regarding the forms of discrimination which are illegal.

On August 27, 1979, the Executive Staff of the SPB met with representatives of the National Committee for Sexual Civil Liberties and the Advocates for Gay and Lesbian State Employees.⁸⁰⁶ At that meeting, the SPB discussed plans for a SPB (federally funded) Sexual Orientation Project scheduled for initial operations in early 1980. In March, 1980, the SPB hired Leroy S. Walker, an attorney and formerly a Fair Employment and Housing Consultant with the Department of Fair Employment and Housing, to act as Manager of the Sexual Orientation Project. On April 30, 1980, Ron Kurtz, Executive Officer of the SPB, sent a memo to "All State Agencies and Employee Organizations," notifying them of the newly formed Sexual Orientation Project, urging "all departments to inform their employees of the creation of this Project."⁸⁰⁷

At about this time, State Senator William Campbell requested an opinion of the Attorney General regarding the authority of the Governor to issue an executive order banning sexual orientation discrimination within state government. Specifically, the question posed to the Attorney General by Senator Campbell was: "Does Executive Order B-54-79 . . . constitute an improper infringement upon legislative authority with respect to the state civil service?" In a published opinion, Attorney General George Deukmejian concluded that the Governor acted within his properly vested authority when he issued the order and that it was not an encroachment on the authority of the Legislature.⁸⁰⁸ The Attorney General stated:⁸⁰⁹

The Governor is authorized to issue directives, communicated verbally or by formal written order, to subordinate executive officers concerning the enforcement of law. Such authority emanates from his constitutional charge, as the "supreme executive power" of this state, to "see that the laws are faithfully executed" . . . and by the very dimension of government which necessitates and requires the assistance and participation of others. . . . An executive order, then, is a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law. . . . Such an order, however, need not be predicated upon some express statutory provision, but may be properly employed to effectuate a right, duty, or obligation which emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and

laws. . . . Nevertheless, the Governor may not invade the province of the Legislature. . . .

Consequently, the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation. . . .

We examine first the provisions of the State Civil Service Act, section 18500 et seq., to determine whether the executive order amends the effect thereof, or qualifies its operation. While the Legislature has not specifically addressed the subject of discrimination based on sexual preference . . . the executive order is not in conflict with any provision of the Act. On the contrary, numerous provisions require that personnel decisions be made on the basis of merit and fitness, and not otherwise. . . .

It is clear, in view of the foregoing, that the prohibition against discrimination "based solely upon the individual's sexual preference" within the purview of the executive order, and without regard, therefore, to the merit and fitness of such individual, is wholly consistent with the Act and neither amends nor qualifies its effect or operation.

Moreover, the executive order effectuates a right, duty, or obligation which emanates from the state and federal constitutions. With respect to the California Constitution specifically, article VII, section 1, subdivision (b) provides and requires that in the state civil service, permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination. This section alone necessarily precludes arbitrary selection standards. . . .

The agencies, departments, boards, and commissions of state government are also prohibited, under the equal protection clauses of the state and federal constitutions, from employment discrimination on the basis of sexual preference in the absence of a showing that such quality would render an individual unfit for a particular job.

Based on its own research, the Commission agrees with the Attorney General's analysis. The Governor's executive order prohibiting sexual orien-

tation discrimination in state employment is merely one method of effectuating "a right, duty, or obligation which emanates from or may be implied from the Constitution" and is one method of enforcing "public policy embodied within the Constitution and laws." Even without such an executive order, the Commission believes all state agencies and departments have a legal obligation to eliminate sexual orientation discrimination from state service.⁸¹⁰ To do otherwise would be to violate the civil service merit principles of the state, principles which have their grounding in the state and federal constitutions.

Only a few months after the Governor issued his executive order on sexual orientation discrimination, the California Supreme Court held that:⁸¹¹

[W]e begin from the premise that both the state and federal equal protection clauses prohibit the state or any governmental entity from arbitrarily discriminating against any class of individuals in employment decisions. . . . Moreover, past decisions of this court establish that this general constitutional principle applies to homosexuals as well as to all other members of our polity: under California law, the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job from which he has been excluded. . . . Courts in other jurisdictions have reached similar conclusions.

Furthermore, the Legislature has found that "the political activities of public employees are of significant statewide concern."⁸¹² Therefore, the Legislature has directed that "no restriction shall be placed on the political activities of any officer or employee of a state or local agency."⁸¹³ According to the California Supreme Court, being openly gay in our present society, or being involved in gay-rights activities, or making an issue of one's homosexuality, each must be considered a "political activity."⁸¹⁴

Thus, of all states in the nation, California appears to have the strongest policy protections against sexual orientation discrimination within state government employment, as adopted by the voters and the Legislature, and as articulated by the Governor, the Attorney General and Supreme Court.

Statutory and constitutional provisions which prohibit state agencies from directly or indirectly discriminating on the basis of actual or perceived sexual orientation of employees or applicants are listed on the next page.

**Provisions of Law Governing
Sexual Orientation Discrimination in State Employment**

(1) Article VII, §1(b) of the state Constitution, [civil service]: merit system employers must not discriminate against any applicant or employee on account of his or her sexual orientation;⁸¹⁵

(2) Article I, §1 of the state Constitution [right of privacy]: state agencies must refrain from prying into the sexual orientation of applicants or employees and must refrain from sharing or using sexual orientation information in a manner which may have an adverse impact on an applicant or employee;⁸¹⁶

(3) Article I, §7 of the state Constitution [equal protection]: state agencies must afford equality of opportunity to lesbians and gay men on the same terms as opportunities and benefits are afforded to applicants or employees with a heterosexual orientation;⁸¹⁷

(4) State Civil Service Statutes [such as Government Code §18500 et seq.]: state agencies governed by these statutes must not discriminate on the basis of the sexual orientation of applicants or employees;⁸¹⁸

(5) Government Code §3201 et seq. [political activities]: state agencies must refrain from pressuring employees to remain "in the closet" or discriminating against those who identify themselves as lesbians and gay men or who are involved in gay-rights activities;⁸¹⁹

(6) Fourteenth Amendment to the United States Constitution [equal protection and due process clauses]: government agencies may not engage in invidious discrimination against persons of one sexual orientation and must refrain from taking arbitrary action against employees or applicants;^{819a}

(7) Executive Order B-54-79, as construed by the California Attorney General. 63 Ops. Cal. Atty. Gen. 583 (1980).

Implementation of the Law: Practical Realities

Both individual and institutional homophobia have been tolerated, if not encouraged, by government throughout history. The fact that California now has strict constitutional and statutory protections against sexual orientation discrimination is a remarkable departure from past policies. Because this shift in policy has occurred only within the past few years, it would be unreasonable to expect departmental managers, supervisors, equal opportunity personnel, and employees to be well informed of these changes, or to understand their full import on personnel actions. As a result of these realities, even strong protective policies and laws become relatively meaningless in employment settings without the development of departmental policies and implementation of education and training programs for departmental personnel.

When the Commission staff reviewed the implementation process within state service -- especially within the merit system -- it found that inadequate efforts have been undertaken, so far, by state departments to implement sexual orientation non-discrimination laws and policies.

Sexual orientation discrimination by state agencies has been deemed to be "arbitrary discrimination."⁸²⁰ As such, it is a violation of merit principles embodied in the state Constitution and state civil service laws. According to the state Constitution, the State Personnel Board "shall enforce the civil service statutes and . . . adopt other rules authorized by statute, and review disciplinary actions."⁸²¹ The Executive Officer of the Board "shall administer the civil service statutes under the rules of the Board."⁸²² Under Government Code section 18654, any power, duty, or jurisdiction which the Board may legally delegate is presumed to have been delegated to the Executive Officer of the Board unless the Board has formally reserved the same to itself.

Over ninety percent of all state employees are protected by the state's merit system. That system is primarily under the control of the State Personnel Board and its Executive Officer. Due to its limited time and resources, the Commission primarily focused its attention on implementation of sexual orientation discrimination protections within the merit system.

The Commission has received from the Executive Officer of the State Personnel Board, a memo dated September 30, 1982, which sets forth the history of implementation of protections within merit-system departments,

the degree of monitoring which has been undertaken by the State Personnel Board, and present and future plans for bringing non-discrimination into reality in state employment.

Law is only as valuable to society as the energy and resources put into practical implementation. Because the above-mentioned memo is probably the most significant statement from a government agency regarding its commitment to such implementation, the memo is set forth in its entirety below. The Commission feels this memo is important for its philosophy and reflection of public policy as much as for its practical particulars.

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STATE PERSONNEL BOARD MEMO
On Implementation Of
LAWS AND POLICIES ON SEXUAL ORIENTATION DISCRIMINATION

1. Compliance

In approximately April 1980, the State Personnel Board informed departments of the prohibition of discrimination based on Sexual Orientation and requested these departments to inform their employees of this protection and to take necessary action to revise policies, procedures, and manuals to reflect this prohibition. In March, 1981 the State Personnel Board followed up with the 37 largest departments to determine if the departments had complied with the earlier request. At that time, only a few departments had totally complied.

By the end of this fiscal year, the State Personnel Board will follow up with all departments to determine if they have revised their affirmative action policy statement, informed all employees by newsletter or memo, and whether they have modified training and other related activities regarding Sexual Orientation discrimination.

2. Training

In addition to other informational activities, the Board also has pursued formalized training on Sexual Orientation discrimination. This year the State Personnel Board contracted with an outside consultant to develop a training package designed for counsellors and investigators in dealing with sexual orientation discrimination complaints. The training program developed through this contract was held July 15, 1982 and was attended by approximately 30 State employees representing eleven State department.

The training program evaluations were generally very positive and there has been considerable interest expressed by a number of State departments in sending employees to future workshops on this topic. Board staff has met with the consultant and is currently negotiating another contract to provide additional workshops patterned after the July 15th training program. These workshops are scheduled for November 30, 1982 and December 1, 1982 and will train an additional 60 departmental EEO/AA and Appeals staff.

3. Policies, Procedures and Forms

The State Personnel Board has addressed the issue of Sexual Orientation by modifying a number of policy statements, manuals informational materials, and forms. These manuals materials, etc. are used by the State Personnel Board staff and personnel management staff throughout the merit system.

- A. Selection Manual Section 4470.11 states that State Personnel Board selection programs "shall not discriminate on the basis

of ...sexual orientation". This manual section has been in existence and utilized by Departmental Services Division (DSD) staff since December 1, 1980.

- B. The Qualification Appraisal Panel (QAP) Training Manual portion of the Selection Manual (section 5520.4) provides direction to interview panel members regarding the issue of sexual orientation discrimination in the interview process. In addition, all interview panel members are now given written information with regard to non-discrimination including sexual orientation as part of their QAP orientation package.

In group orientations for multiple interview panels for the classes of Conservationist I and II, California Conservation Corps and State Traffic Officer, Board staff has discussed the inappropriateness of questioning or scoring candidates on the basis of perceived sexual orientation.

Discussion of discrimination based on sexual orientation will be included in all group-panel orientations.

- C. Policy division staff by the end of December will update remaining Selection Manual sections "Direction for Qualifications Appraisal Panel Members" (5515) and "Directions for EDA Rating Committee" (5595) to include current language on discrimination based on sexual orientation.
- D. In January, 1982 the header on bulletins for centrally administered exams was revised to include the statement that the State of California was an equal opportunity employer "without regard to ...sexual orientation". The Delegated Testing office and responsible DSD staff have been directed to insure that all bulletins (notices of testing) for delegated exams include this same notation.
- E. As part of any classification specification revision, DSD staff are reviewing the language, with specific attention to "Special Personal Characteristics" to insure that no language which could be considered inappropriate, offensive or discriminatory is included.
- F. As part of the affirmative action sensitivity training which is mandated by State Personnel Board sanctions orders (applicable to the Departments of Forestry and Parks and Recreation), departmental staff will be required to include a section on discrimination based on sexual orientation.

- G. The current withhold from certification process does not include a mechanism to determine if the basis of a withhold could be any form of discrimination. Staff will institute a check on our current process immediately.
- H. Those involved in test development, including State Personnel Board analysts and technicians, personnel staff in departments with decentralized selection, and departmental consultants, are trained to review each test item, or each test component, to ensure its job relatedness. This job-relatedness review applies not only to written exams, but also to minimum qualifications, oral interviews, performance tests, physical agility tests, and any other components which may be used to screen individuals. Since a particular sexual orientation is not a bonafide requirement for any job classification, questions related to sexual orientation are ruled out. Similarly, questions which would be categorically offensive to those of a particular sexual orientation are not relevant to any State job and are not part of the exam process.
- I. The Policy and Standards Division of the State Personnel Board will incorporate findings regarding sexual orientation discrimination from the final report of the Personal Privacy Commission in a new memorandum to all departments describing all the legal bases prohibiting discrimination based on sexual orientation. This will serve to update departmental staff and reiterate State Personnel Board policy. This memo will be issued after the Personal Privacy Commission's report is released.
- J. By March 1, 1983 the Public Employment and Affirmative Action Division (PEAAD) will draft a new section for the affirmative action manual devoted to sexual orientation discrimination policy. It will be a complete reference guide for departmental staff on sexual orientation discrimination in State employment.

4. Appeals

Each State department, as required by the State Personnel Board, has a discrimination complaint process which provides for initial review of complaints at the departmental level with final adjudication responsibility with the State Personnel Board. At the State Personnel Board, sexual orientation complaints are assigned for investigation to the Appeals Division upon completion of the departmental appeal process. Appeals Division staff responsible for discrimination complaint investigation have been trained regarding sexual orientation discrimination. Current response time on all types of discrimination complaints is approximately four months from date of receipt.

Appeals Division staff is planning a review of current departmental and State Personnel Board discrimination complaint appeal processes to evaluate their efficiency and effectiveness with a June, 1983 completion date. This evaluation will consider the accessibility of the processes to applicants and employees, response time, quality of investigation and analysis, consistency and equity of decisions, including remedies, and issues of reprisal. In the case of sexual orientation and/or sexual harassment complaints, it will also consider whether to provide for direct appeal to the State Personnel Board or the need to establish different criteria for prioritizing assignment of cases for investigation.

5. Sexual Orientation Project

A. AGENCY/STATE PERSONNEL BOARD MEETINGS

In a continuing effort to provide information regarding sexual orientation discrimination the State Personnel Board project coordinator has been scheduled to make a presentation on the subject at the various State Personnel Board/Agency meetings this quarter. These Agency meetings provide an opportunity to meet with Agency staff as well as department Affirmative Action Officers, Personnel Officers, and Women's Program Officers to provide current information and to answer questions.

On September 16, 1982 the project coordinator made the first of these presentations at the State Personnel Board/Health and Welfare Agency meeting. The presentation included current law and policy on sexual orientation discrimination including a discussion of the Gay Law Students vs. PT&T suit and its application to State employment. Also discussed were departmental responsibilities for updating policies, providing for publicity on the policy and including sexual orientation discrimination training in appropriate department training programs. Information was shared regarding problem areas which have come to the attention of the State Personnel Board in recent months. Departmental staff was advised on handling discriminatory work environments, sexual orientation discrimination found in background investigations and hiring for peace officer classes, and the problems of stereotyping and discrimination in QAPs and hiring interviews.

Departmental and Agency staff were advised of the sexual orientation project's current activities and reminded that the State Personnel Board could provide technical assistance on handling complaints, revising policies, establishing training segments and writing newsletter articles. This same presentation will be made at all upcoming State Personnel Board/Agency meetings.

B. ON-GOING ACTIVITIES

The following describes on-going activities engaged in by the project coordinator:

- i. The project coordinator meets with the advocacy organization, Advocates for Gay and Lesbian State Employees, at regularly scheduled monthly meetings. The coordinator has also met with members of the organization to discuss the training given by the State Personnel Board, the California Highway Patrol, non-discrimination and discrimination complaint policies of individual departments, the background investigation procedure as well as several discrimination complaints.

Over the past year, individuals in the gay and lesbian community have contacted the project coordinator to obtain information on the Governor's Executive Order, policies on non-discrimination within the State Civil Service System, University and College Systems, and information to be used by gay and lesbian community organizations statewide. Contacts from the gay and lesbian press are also directed to the project coordinator. The project coordinator's phone number and name have been listed in articles in the gay and lesbian media as a contact for anyone requesting information on the State's policy on sexual orientation discrimination.

- ii. The project coordinator provides technical expertise to departmental Equal Employment Opportunity (EEO) staff and State Personnel Board Appeals Division staff on sexual orientation discrimination. Over the past year, the coordinator has responded to over 20 inquiries from departmental staff. The majority of these calls were from departments seeking information on State Personnel Board policy and on resolving discrimination complaints. The project has also provided copies of the Governor's Executive Order, the State Personnel Board's "pinkie" and the glossary to numerous departments.

Technical expertise has also been provided to departments in the form of presentations made to departmental staff. Recently, a two-hour training session was given to Women's Program Officers (WPO) at the monthly meeting. The training included the departmental WPO's role in sexual orientation discrimination complaint resolution, legal and policy issues, as well as a presentation by Advocates for Gay and Lesbian State Employees about their organization and what its membership sees as major problems of sexual orientation discrimination in State

service. Hour-long presentations were made to Cal-Trans and the Department of Water Resources EEO/AA and Disabled Advisory Committee (DAC) staff. Over 75 individuals were present for the two meetings which were designed to increase awareness of the issue and to provide them with the technical knowledge to resolve discrimination complaints. In all training sessions and presentations, information is provided on the importance of establishing a discrimination-free working environment for gay and lesbian employees.

- iii. In the past year, the project coordinator has been contacted by over 30 individual state employees requesting information on sexual orientation discrimination. The majority of these individuals have contacted the coordinator since January of this year and have made specific allegations of discrimination based on their sexual orientation. (Only five of the contacts were by individuals requesting general information on the state policy.) The project coordinator provided information on the discrimination complaint system and contacted departments directly, when requested, to offer assistance in resolving the complaint. Nine of the complaints were of a serious enough nature that the project coordinator remained involved throughout the procedure to attempt to assure a timely and fair resolution.

Additional contacts from gay and lesbian individuals seeking information on sexual orientation discrimination in employment have totalled over 15. These individuals were employees of the legislature, University and State College systems, as well as employees of the private sector. A number of these calls were for information regarding benefits such as health and dental coverage, family sick leave, and travel privileges for gay and lesbian couples. The coordinator referred these individuals to the proper agency or to a contact in the community to obtain the appropriate resource.

- iv. The project coordinator has provided complainants with a number of complaint-filing options. Although the discrimination complaint system is the usual method of seeking resolution, the coordinator also provides the complainant with additional options if warranted by the circumstances. Other options utilized by the coordinator have included counseling for informal resolution, confidential contacts by the coordinator to both individuals and departmental EEO staff, and a wide range of referrals to community resources.

Individuals have also been advised of their options to file with the Labor Commissioner under sections 1101 and 1102, to pursue a tort claim, and to request the State Personnel Board to file charges. Individuals have also been advised of the right to voice their charges of sexual orientation discrimination in an appeal from punitive action.

The coordinator is responsible for following-up on complaints made by State employees in order to assure that the complaint system utilized is effective. Although most complaints have been resolved, a number are still in the process and continue to be monitored. Throughout the process, the coordinator keeps in contact with the complainant (as well as the department if the individual requests it) to advise and assist him/her.

- v. The coordinator provides other jurisdictions with information on the State policy and complaint system. A number of contacts have come from local public agencies and unions.

6. Local Government Services

The State Personnel Board, Local Government Services Division (LGSD) is responsible for insuring compliance with merit system standards in county personnel systems covering employees in welfare and public health departments. For large counties where the merit system has been approved by LGSD as meeting merit system standards, LGSD performs compliance audits on a three-year cycle. As part of this audit, LGSD reviews discrimination complaint processes, including sexual orientation discrimination complaint processes, to insure they are viable and effective. In all other counties, this audit is performed on an on-going basis.

In addition, for the last year and a half, LGSD has provided training in sexual awareness including appropriate action to take in cases of complaints of sexual harassment. This training has been conducted at the request of county management. To date, LGSD has provided training to approximately ten counties. This fiscal year, LGSD plans to develop a module on sexual orientation discrimination, using existing resources, to be available upon request as a part of this training program.

7. Internal State Personnel Board Activities

The State Personnel Board has also been cognizant of sexual orientation issues in its internal personnel program. The Training Officer has revised the "New Employee Orientation" package to include our EEO statement covering sexual orientation discrimination, as well as other forms of discrimination. This new package will be used in

the October New Employee Orientation class and in each such class thereafter.

In addition, the Affirmative Action Officer and Training Officer are working on a training update for the State Personnel Board's EEO counselors and investigators, to occur by the end of November. The training will include material on sexual orientation discrimination as well as other types of discrimination.

The Affirmative Action Officer is also in the process of developing a small graphic to be posted on State Personnel Board bulletin boards, to remind employees that persons should not be discriminated against because of their sexual orientation.

[END OF STATE PERSONNEL BOARD MEMO ON SEXUAL ORIENTATION]

. . .

The Commission's recommendations may overlap to some extent the plans expressed by the State Personnel Board in the above memo. In those cases, the purpose of the recommendation is to provide encouragement and, in some aspects, practical assistance to the Personnel Board.

THE COMMISSION RECOMMENDS that the Executive Officer of the State Personnel Board issue a new memorandum to "All State Agencies and Employee Organizations" fully explaining all legal bases of protection against such discrimination. Such a memo is evidently a part of the present plan of implementation and the Commission refers the Executive Officer to page 397 of this Report and related authorities for a list of the legal bases found by the Commission.

THE COMMISSION RECOMMENDS that the State Personnel Board establish a systematic procedure for monitoring and auditing departmental compliance with non-discrimination policies. After the Executive Officer sends out a revised memo explaining all bases for legal protection for the sexual orientation classification, departments should be advised that audits will require proof: (1) that "sexual orientation" has been added to non-discrimination policies wherever they appear in departmental literature; and (2) of the dates, circumstances, and methods which have been employed to inform personnel of the nature of sexual orientation discrimination and all legal bases under which it is prohibited. An audit of every department under the jurisdiction of the State Personnel Board should be completed within one year.

The plans of implementation discussed in this section of the Report depend to a large extent on the allocation of human resources to develop and monitor programs both inside and outside of the State Personnel Board. Presently, one person is assigned sexual orientation duties one-quarter time within the State Personnel Board. This is insufficient and has created and undoubtedly will continue to create frustration, delays, oversights, and other deficiencies in implementation.

THE COMMISSION RECOMMENDS that a person at the manager level be assigned to coordinate, on a full-time basis, implementation and monitoring of the Board's constitutional and statutory duties with respect to sexual orientation discrimination, and that, beginning with the 1983-84 budget year, the Legislature provide funding for such a position.

Local Government Employers

According to the United States Census Bureau, local governments in California employ over one million workers.⁸³¹ These workers are employed by over 6,000 local jurisdictions, approximately 500 of which have merit systems.⁸³² Since any government entity in California is prohibited from engaging in arbitrary discrimination, local governments are constitutionally prohibited from engaging in sexual orientation discrimination in employment.⁸³³

To the extent allowed by limited time and resources, this Commission has reviewed the local government employment status of lesbians and gay male workers. This section of the Commission's Report will examine the types of legal protections which presently exist at the local government level throughout the state with a brief look at implementation. Somewhat closer attention will be paid to two areas of municipal employment which have traditionally been a problem for lesbians and gay men: law enforcement and public schools.

Protective Laws and Policies

According to the California Supreme Court, the equal protection clauses of both the state and federal constitutions clearly prohibit the state or any governmental entity from engaging in employment discrimination against employees or applicants on account of their sexual orientation.⁸³⁴ Furthermore, the right of privacy in the state and federal constitutions prohibits unreasonable inquiries into or adverse decisions based upon sexual orientation.⁸³⁵ Thus, each of California's 6,000 municipal employers bears a constitutional responsibility not to engage in such employment practices.

Local governments which have merit systems have additional reasons for providing equal employment opportunities to all regardless of sexual orientation. The foundation of merit systems is the principle that arbitrary discrimination will not be tolerated. It is now an accepted merit principle that sexual orientation discrimination constitutes arbitrary discrimination and is not related to merit or fitness.⁸³⁶

California's Government Code prohibits state and local governments from interfering with the political activities of employees. As was discussed previously in this Report, persons who choose to be openly gay at work are

protected under provisions protecting political activities. (See page 396 of this Report, and authorities cited in notes 811-814.)

Municipalities in California have passed local ordinances specifically prohibiting sexual orientation discrimination in government employment:⁸³⁷

Berkeley
Cupertino
Palo Alto
Mountain View
San Francisco
San Mateo County
Santa Cruz County
Santa Clara County
City of Los Angeles
City of Santa Barbara

Some municipalities have acknowledged their responsibility not to engage in sexual orientation discrimination pursuant to collective bargaining agreements with local government employee unions. Contra Costa County, for example, has such a memorandum of understanding.⁸³⁸

Thus, there exists a plethora of protection against sexual orientation discrimination by local government employers. However, implementation and enforcement are quite another matter.

Implementation of the Law

Local governments are covered by the provisions of the Fair Employment Practices Act. The state Department of Fair Employment and Housing (D.F.E.H.) will receive, investigate, conciliate and remedy complaints of employment discrimination alleged to have been engaged in by municipal employers, but only for the categories over which the Legislature has mandated jurisdiction. Presently, D.F.E.H. is authorized only to handle complaints alleging discrimination on the following bases: race, religion, color, national origin, sex, age, marital status, and disability.

Since the Legislature has not added "sexual orientation" to the Fair Employment Practices Act, applicants or employees victimized by such municipal employment discrimination have no state agency to assist them

in resolving their complaints. As a result, victims must file a complaint with the municipality itself, and, if satisfactory action is not taken, the only remaining option is to file a complaint in court.

The California Constitution requires that all laws of a general nature be uniform in operation.⁸³⁹ The Commission has found, however, that sexual orientation discrimination laws are not applied uniformly in the various municipalities.

Many of the state's 6,000 municipal employers have not updated their non-discrimination policies to ensure that equal employment opportunities are afforded regardless of "sexual orientation."

For example, the Commission was informed that San Diego County does not include sexual orientation in its EEO policy and that the County resisted requests to include sexual orientation in the non-discrimination clauses in contracts with local unions. Similarly, in Kern County, the personnel department's Affirmative Action Office recommended that sexual preference be included in a revised policy statement, but that recommendation was not implemented.⁸⁴⁰

In Bakersfield, until a local resident protested, the city was asking all job applicants if they had "homosexual tendencies." This interrogation was found on that portion of the city's health questionnaire designed to elicit information regarding illnesses with which applicants had been afflicted. Calling the protest "unnecessary," the personnel manager finally removed the question.^{840a}

In Imperial County, a member of the Board of Supervisors recently questioned an applicant about her sexual orientation. After a protest, the supervisor publicly stated, "If you want to label me anti-queer, I'll proudly wear that label."⁸⁴¹

In contrast to the above situations, on May 9, 1975, the Los Angeles City Attorney issued a formal opinion to the Civil Service Commission which stated that sexual orientation discrimination was illegal under state law.⁸⁴² On May 7, 1976, the Los Angeles Civil Service Commission unanimously removed "overt homosexuality" from civil service rules as a disqualifying factor.⁸⁴³ Soon thereafter, the City Personnel Department eliminated the "homosexual tendencies" question from the pre-employment health questionnaire. In 1977, the City revised its equal employment opportunity statement to reflect non-discrimination on the basis of sexual orientation. The mayor, city attorney, and some city council

members have hired openly-gay job applicants in important city jobs. Police Chief Darryl Gates has issued a formal policy statement indicating that his department does not discriminate in personnel matters on the basis of sexual orientation.⁸⁴⁴ Similar non-discrimination policies and practices have been in effect in San Francisco for several years.

It is apparent to the Commission on Personal Privacy that recent changes in state law have not filtered down to all local government officials throughout this state. Some municipalities are either unaware of their obligations under present law or simply choose to ignore them.

THE COMMISSION RECOMMENDS that the Chair of the Local Government Committee of the California State Senate request from the California Attorney General a formal written opinion stating whether sexual orientation discrimination by local government employers is presently illegal and, if so, setting forth the constitutional and statutory provisions under which local government employers are prohibited from discriminating on the basis of sexual orientation. It is further recommended that after such an opinion is obtained, the Local Government Committee transmit copies of this legal opinion to city attorneys, county counsels, and local government personnel officers. This would be a constructive and positive way to eliminate some of the discrimination which is a product of ignorance of the law.

The Commission also believes that self-enforcement by local government employers or, ultimately, judicial enforcement when victims have enough resources to use the courts, are inadequate remedies. No other minority group has been expected to "fight city hall" by itself. Racial and ethnic minorities, women, elderly, disabled, and other groups have the services of the state Department of Fair Employment and Housing to investigate and remedy discrimination against their members.

THE COMMISSION RECOMMENDS that the Legislature authorize the Department of Fair Employment and Housing to investigate, conciliate, and remedy complaints which allege that local government employers have engaged in sexual orientation discrimination against employees or job applicants with respect to hiring, dismissal, or any other term or condition of employment. To accomplish this purpose, legislation should be enacted to add "sexual orientation" to the Fair Employment and Housing Act.

There is also a tremendous lack of information as to the level of compliance or non-compliance by local government employers with sexual orientation non-discrimination laws. With respect to each of the 6,000

municipalities, a number of questions should be answered: (1) Is the employer aware that sexual orientation discrimination is presently illegal under state law? (2) Has the employer up-dated its non-discrimination policy in all relevant departmental employment documents and literature to reflect non-discrimination on the basis of sexual orientation? (3) Have personnel officers, equal employment opportunity officers, affirmative action officers and supervisory personnel in each department within the municipality received training regarding sexual orientation discrimination? (4) Have pre-employment forms, questionnaires, and oral interviews eliminated direct or indirect questions relating to sexual orientation or "homosexual tendencies"? (5) Have civil service rules eliminated homosexuality as a disqualifying employment factor?

THE COMMISSION RECOMMENDS that the Local Government Committee of the California State Senate conduct or cause to be conducted a survey of local government employers in California to determine the answers to the questions listed above. The Local Government Committee should devise a method to fund the survey and might consider delegating the responsibility for oversight of the project to the State Personnel Board, Local Government Services Division. A report containing survey results and an analysis should be published by the Legislature.

. . .

Law Enforcement Employers

Historically, some of the greatest resistance to equal employment opportunities for lesbians and gay men has come from law enforcement employers. The Commission staff has been able to review the employment practices and policies of a few local law enforcement agencies in California.

Los Angeles:

Prior to 1976, the Los Angeles Civil Service Commission considered "overt homosexuality" as a personality disorder which disqualified an applicant from consideration for a sworn position with the Los Angeles Police Department.⁸⁴⁵ Pursuant to a formal opinion issued by the Los Angeles City Attorney in 1975, "overt homosexuality" was eliminated by the Civil Service Commission as a disqualifying factor in 1976.⁸⁴⁶ This was accomplished over demonstrative protests of the chief of police. In 1975, the Los Angeles City Council had narrowly defeated a proposal by one of its members to explicitly forbid the police department to hire gay officers.⁸⁴⁷

This change in employment standards poses a problem for any officers presently on the force who were hired before the policy change and who may have denied their homosexuality when they were first hired. Although they cannot now be fired for their sexual orientation, it is technically possible that they could be disciplined for having given false information in their pre-employment interviews. This dilemma was considered by both the Civil Service Commission and the City Attorney. The President of the Los Angeles Civil Service Commission replied to the issue as follows:⁸⁴⁸

Thank you for expressing your concern that any gay fire and police personnel not be terminated solely because they may have falsified previous employment information regarding their sexual preference. . . .

[T]he question which you raised is complex and cannot be answered quickly. However, I hope the following information will assist you.

The Board of Civil Service Commissioners does not have jurisdiction over disciplinary actions taken against sworn personnel. A Board of Rights is established in the Fire and

Police Departments to hear such cases and their findings and recommendations are ultimately presented to the respective Commissions of those Departments.

However, any future disciplinary cases regarding previous falsification of information concerning sexual preference should be considered in light of recent City policy changes [referring to revision of medical standards and adoption by City Council and approval by Mayor of sexual preference in the City's nondiscrimination policy].

A senior assistant to the Los Angeles City Attorney offered these suggestions as possible solutions to the problem:⁸⁴⁹

This Office has received your letter wherein you inquired about waivers for persons who may have given certain false information on City employment applications regarding homosexual experiences. Specifically, your question is who is empowered to grant such waivers for persons employed in the Police and Fire Departments.

Under the City Charter, the Chief of Police and the Chief Engineer of the Fire Department are empowered to administer discipline within their departments. The exercise of this power is subject to the instructions of the Board of Police Commissioners and the Board of Fire Commissioners respectively.

It would appear that if the Chief of Police or the Chief Engineer, whether pursuant to Board instructions or otherwise, were to issue a statement indicating that no discipline would be imposed on an employee for disclosing the fact of a particular false statement on an application, that statement would constitute a waiver within the context of your question. It should be recognized, however, that such an action by either of the chiefs would not necessarily be binding on their respective successors or on future boards of commissioners.

The Chief of Police in San Francisco, both within his department and publicly, has encouraged lesbians and gay men who are currently employed as officers to feel free to acknowledge their status without fear of repercussions.

THE COMMISSION RECOMMENDS that all police, sheriff, and fire departments throughout the state follow the San Francisco precedent and officially make a public statement to members of these departments that there will be no repercussions if an employee's sexual orientation becomes known.

On the subject of sensitivity training of officers and recruits regarding police contact with the lesbian and gay community, the Los Angeles Police Chief responded to an inquiry of some leaders:⁸⁵¹

At the present time, all police recruits attend a one-hour class entitled, "Sociological Issues." This class is specifically devoted to sensitizing recruits to the concerns of the homosexual community at large and the gay-lesbian community specifically. It includes definitions of terms commonly used within the gay-lesbian community which are acceptable and those which may be offensive. In addition, a member of the gay-lesbian community is invited to sit in as an observer and a resource person each time this class is given. That representative assists the instructor in answering questions and providing additional insights into the class. A glossary of terms commonly associated with sexual orientation, which was prepared by the California State Personnel Board and occasionally distributed by the Gay-Lesbian Community Services Center, is also used as a source document for this instruction.

Training of the remainder of the line personnel is provided through daily roll call training. As a minimum, twice each month all officers receive training involving police community relations, which includes discussion of the inherent dignity of all human beings. Therefore, it is my opinion that what we are presently doing already meets the demands you have made. . .

The chief also has indicated that the Los Angeles Police Department will not make any special outreach to the lesbian and gay community in its recruitment efforts.⁸⁵²

The Commission received testimony at its public hearings alleging that sexual questioning by the L.A.P.D. of applicants during polygraph examinations continues to elicit sexual orientation information which is misused so as

to screen out gay applicants.⁸⁵³ Furthermore, it has been alleged that sexual orientation discrimination is sometimes directed at existing employees.⁸⁵⁴

After a distinguished career [Mr. J.] has been retired on disability because he is a homosexual. . . . This happened within the last three years and was a direct result of the leadership at the Rampart Division.

The Commission on Personal Privacy has focused on the Los Angeles Police Department in its investigation of sexual orientation discrimination by law enforcement employers simply because more information was available about this department than any other. If the policies and practices of other local law enforcement agencies were audited, the Commission expects that the results would show that most departments do not have openly gay officers on their forces, and most do not include sexual orientation concerns in their training programs. Specific instances of discrimination in hiring practices are also likely to show up.⁸⁵⁵

San Francisco:

Hiring policies in the City and County of San Francisco forbid discrimination on the basis of sexual orientation. "[P]olice recruits are not asked officially whether they are homosexuals. And they are not identified as such as they undergo departmental tests and training."⁸⁵⁶ "The San Francisco Police Department has gone out of its way to prevent harassment or discriminatory actions against homosexuals. Chief Cornelius P. Murphy issued what he called his 'personal endorsement' to a Police Commission policy that forbids discrimination on the basis of sexual orientation. In talks to officers, Murphy has stressed that all new recruits will be judged on professional competence -- and nothing else."⁸⁵⁷

The San Francisco Police Department now has several openly gay officers. Les Morgan, the director of Gay Outreach Program, stated:⁸⁵⁸

The level of acceptance is much higher than we'd expected it to be. For the most part, we're being treated like what we are -- ordinary people. [Nonetheless,] . . . some homosexual officers here say they still encounter some hostility. One officer reports he has found notes on which were scrawled "faggot" and "clone" in his locker. One officer was told there were "too many fruits" in the department. Others say their homosexuality is behind the refusal of some

officers to associate with them or willingness to share some duties.

Other northern California law enforcement agencies have reacted to lesbian and gay officers with a variety of responses ranging from support to hostility. One account is told in a Los Angeles Times article:⁸⁶⁰

Her childhood idol was John Wayne. And as she grew up in Nebraska, Stephanie Toothaker had always wanted to become a police officer. Finally, after moving to California, she got her wish -- joining the force in Palo Alto.

Nothing too unusual about that these days. But what did surprise a lot of people was Officer Toothaker's admission last fall at the public meeting that she is a homosexual.

"After the gasps, you could have heard a pin drop," she says. "When I went back to work I expected the worst. The other officers could have made my life miserable. But they didn't. I was amazed at the support I got. They said, 'it took a lot of guts to do what you did, lady, and we respect you - you're a good officer.' . . . I was floored."

Toothaker is one of a handful of homosexuals who have recently broken social and legal barriers to become police officers in the San Francisco Bay area. And like her, these officers are reporting surprisingly wide acceptance among their fellow officers.

In contrast, the reaction of the Contra Costa County Sheriff to the prospect of hiring an acknowledged gay person was quite negative. According to the "Findings of Fact" of an administrative law judge for that county's Civil Service Commission:⁸⁶¹

Denise Kreps (appellant) applied for a position as a Deputy Sheriff in the Contra Costa County Sheriff's Department (respondent) in February, 1979. She successfully completed oral and written exams and an agility test and placed sixteenth on an eligibility list of 181 successful candidates . . .

On October 17, 1979, as part of the employment screening process, appellant was required to undergo a polygraph test. On that date, in response to specific

questions posed by the polygraph examiner, appellant acknowledged that she had engaged in homosexual activities on seven to ten occasions since the age of 17, with the most recent occurrence being on the previous night.

On October 26, 1979, appellant was advised by respondent's Personnel Officer that the Sheriff had decided to disqualify her from consideration for a Deputy Sheriff position due to her homosexuality. On October 30, appellant was personally advised of this decision by the Sheriff. . . .

The Sheriff decided to disqualify appellant from consideration for a position as a Deputy Sheriff because of his belief that appellant's homosexuality rendered her unfit to perform the duties of a Deputy Sheriff in a detention facility. The determination of unfitness was made without a consideration of any aspect of appellant's background other than her acknowledged homosexuality and it was not alleged that anything other than her sexual orientation rendered appellant unfit to serve . . .

The administrative law judge granted her appeal and the Civil Service Commission did likewise. The Sheriff then filed a suit in Superior Court seeking to overturn the decision of the Civil Service Commission.⁸⁶² After finding that the Sheriff had been granted a fair hearing by the Civil Service Commission and that the decision of that Commission was supported by the facts, Superior Court Judge Richard P. Calhoun, held:⁸⁶³

Petitioner's refusal to hire homosexuals in general, and [Denise Kreps] in particular, for the position of deputy sheriff is discrimination on the basis of sexual orientation, has no rational basis, and violates the Equal Protection clauses of the California and United States Constitutions. . . . The Sheriff is ordered to arrange forthwith for the completion of Ms. Kreps' pre-employment processing.

There has been general resistance by law enforcement agencies throughout California to the hiring of lesbians and gay men as peace officers. That may be due, in part, to the stigma of criminality which was formerly attached to homosexuality. Myths and stereotypes, such as homosexuality being an illness or homosexuals being child molesters, also have reinforced this resistance. As was discussed earlier in this Report, homosexuality is

neither a crime nor an illness, and homosexuals are no more likely to molest children than are heterosexuals. Therefore, a major educational effort is needed if lesbians and gay men are going to be afforded equality of opportunity by all law enforcement employers.

Because many law enforcement employers are unaware of their new legal obligations, the Commission believes that all employers of peace officers in this state would benefit from management counseling regarding the illegality of sexual orientation discrimination both in recruitment and selection. Likewise, all police and sheriff departments could use assistance in developing instruction materials and segments of courses about the gay and lesbian community.

The California Commission on Peace Officer Standards and Training (P.O.S.T.) is "responsible for the establishment and maintenance of minimum standards of physical, mental and moral fitness for the recruitment, selection, and training of law enforcement officers."⁸⁶⁴ Its Standards and Training Program "[c]onducts inspections to determine whether law enforcement agencies that receive state aid are adhering to adopted standards for recruitment and training, and provides assistance to raise the level of competence through the recruitment, selection, and training process."⁸⁶⁵ Its Technical Services Program "researches management problems confronting local law enforcement agencies, develops workable solutions to them, and provides law enforcement agencies with publications dealing with solutions to specific management questions and problems."⁸⁶⁶ Its Administrative and Counseling Program "identifies, evaluates, and recommends courses of action to solve administrative problems of local law enforcement agencies by conducting general surveys involving extensive review and analysis of each agency's operations and specialized surveys limited to examinations of specified areas."⁸⁶⁷

The Commission on Peace Officer Standards and Training is certainly one of the state agencies which should address discrimination against actual and potential gay and lesbian peace officers. Uniform minimum standards for recruitment and selection by local law enforcement employers need to be developed with respect to sexual orientation discrimination. P.O.S.T.'s inspections of such agencies which receive state aid need to include an audit of non-discrimination policies and practices as well as educational programs within each local department to determine: (1) if departments are even aware of their legal obligations in this area; (2) if departments have updated

their non-discrimination policies to include "sexual orientation;" and (3) whether training regarding homosexuality and the gay and lesbian community is accurate and unbiased.

THE COMMISSION RECOMMENDS that the Commission on Peace Officer Standards and Training, within their established programs, develop minimum standards for non-discrimination and equal employment opportunity in recruitment, selection, and education by law enforcement employers in the area of sexual orientation discrimination. These standards should be disseminated to all law enforcement employers in this state at the earliest possible opportunity. Finally, ongoing audits conducted by P.O.S.T. should include an examination of compliance with constitutional and statutory sexual orientation discrimination laws.

Since sheriff departments are operated within the personnel system of counties, the County Personnel Administrators Association of California could provide assistance to its members in the form of educational programs and materials as well as professional counseling. The Local Government Services Division of the State Personnel Board plays an important role within this organization.

THE COMMISSION RECOMMENDS that the SPB, through its Local Government Services Division, develop or cause to be developed educational and counseling materials to assist county personnel administrators in understanding and meeting their legal and moral obligations to include "sexual orientation" within their existing equal employment opportunity programs.

THE COMMISSION RECOMMENDS that city attorneys, county counsels, and district attorneys through the state familiarize themselves with formal legal opinions on the subject of sexual orientation discrimination in government and private employment, such as Gay Law Students Association v. Pacific Telephone Co. (1979) 24 Cal.3d 458 and 63 Ops. Cal. Atty. Gen. 583 (1980). Then city and county personnel administrators should be advised of their current legal obligations not to discriminate on the basis of sexual orientation. A policy statement should also be developed and distributed to deputy district attorneys regarding investigation and prosecution of complaints alleging violation of sections 1101 and 1102 of the Labor Code, which sections prohibit discrimination by private employers by reason of an employee's political activity, including being openly gay at work.

Teachers in Public Schools

Notwithstanding the fact that public opinion polls show that the majority of people are uneasy with the idea of lesbians and gay men teaching in the public schools, largely because of the myths discussed earlier in this Report, California teachers have a large measure of protection and public support.

On the heels of a successful anti-gay campaign waged in Miami, the California Save Our Children Campaign was initiated. Chaired by State Senator John Briggs, the "Save Our Children Committee" was organized and spearheaded by a variety of religious leaders throughout the state. Their literature stated, "[A]vowed homosexuals are teaching young children in the public schools of California. I don't think I have to tell you how dangerous this is."⁸⁶⁸ The campaign to eliminate gay personnel from schools gathered sufficient signatures to place the so-called "Briggs Initiative" on the November ballot in 1978 as Proposition 6.⁸⁶⁹ After a long, hard-fought, and emotional battle, nearly sixty-percent of the persons who went to the polls voted against the measure.⁸⁷⁰ Thus, the right of personal privacy of public school teachers was affirmed.

School Boards in communities such as Palo Alto, Santa Barbara, and San Francisco have formally adopted policies which prohibit sexual orientation discrimination in their employment practices.⁸⁷¹

Furthermore, the major associations and unions for educators, such as those listed below, have taken positions condemning sexual orientation discrimination against teachers.⁸⁷²

- American Federation of Teachers
- United Federation of Teachers
- California Federation of Teachers
- National Education Association
- National Council of Teachers of English

School districts throughout California have a legal obligation not to discriminate in their employment practices on the basis of the sexual orientation of their employees, pursuant to constitutional privacy and equal protection clauses as well as various government code sections.⁸⁷³

THE COMMISSION RECOMMENDS that the Board of Regents of the University of California, the Trustees of the California State University

System, and the Board of Governors of the California Community Colleges should each review the nondiscrimination policies within their respective systems for both admissions and employment practices to ensure that "sexual orientation" has been added a protected classification. Equal employment opportunity personnel within each system should receive training on sexual orientation discrimination within ongoing training programs. College placement services should require employers to certify that they do not engage in sexual orientation discrimination.

The Commission takes note that the Board of Trustees of the California State University and Colleges System and some community colleges have already taken some action with respect to non-discrimination on the basis of sexual orientation.⁸⁷⁴

THE COMMISSION RECOMMENDS that the State Board of Education and the Superintendent of Public Instruction send notification to all local school districts throughout the state reminding them that sexual orientation discrimination in employment is illegal and requesting them to update their equal employment opportunity policy statements accordingly.

Public school teachers in California must be credentialed by the Commission on Teacher Preparation and Licensing. According to the California Supreme Court, a teacher's homosexuality, in itself, may not form the basis for revoking a teaching credential.⁸⁷⁵ Other professional licensing agencies in California have issued policy statements that "publicly affirmed homosexuality does not in itself preclude a person otherwise qualified from" obtaining a professional license.⁸⁷⁶

THE COMMISSION RECOMMENDS that the Committee of Credentials of the California Commission for Teacher Preparation and Licensing issue a policy statement that publicly affirmed homosexuality would be treated the same as publicly affirmed heterosexuality for purposes of denying, suspending, or revoking a teaching credential.

. . .

Private Employers

Some cities, such as Los Angeles and San Francisco, have ordinances which make it illegal for a private employer to discriminate on the basis of sexual orientation.⁸⁷⁷ Any applicant or employee who suffers from such discrimination has a private cause of action against the employer and can bring suit in court alleging a violation of such an ordinance.

Employers who engage in such discrimination in municipalities which do not have such an ordinance may still be liable under the law. A memo issued on June 13, 1979, by the State Labor Commissioner to those working in branch offices throughout the state underscored that criminal sanctions may be imposed against private employers who discriminate against openly-gay employees:⁸⁷⁸

In a recent Supreme Court decision . . . the court decided that homosexuals may assert a cause of action against an employer for violation of Labor Code Sections 1101 or 1102, alleging they were discriminated against because of their being "manifest" homosexuals or persons making "an issue of their homosexuality." In its opinion, the court states, "The struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."

With the widespread publicity this case has received, we may have claims filed in our field offices under the theory advanced by the court. I am therefore furnishing the Senior Deputy in each office that part of the Supreme Court's decision dealing with Labor Code Sections 1101 and 1102. Note that the remedy for violation is criminal prosecution.

Should you have any questions regarding this matter, you may wish to contact our Legal Section.

Sexual orientation discrimination by private employers may also constitute a violation of the right of privacy in the state Constitution.⁸⁷⁹ A number of court decisions have held that an individual's sexual orientation is presumptively unrelated to fitness for a job.⁸⁸⁰ One of the principal mischiefs that was to be addressed by the 1972 Privacy Amendment adopted by the voters was to curb the overbroad collection and retention of unnecessary personal information by government and business interests.⁸⁸¹

Obviously, collecting information from an employee or applicant on a matter that is presumptively unrelated to job fitness would constitute unnecessary collection of personal information.

The 1972 Privacy Amendment is self-executing and confers on every individual a cause of action against any privacy invader -- whether government agency or private business. Thus, private employers who collect sexual orientation information about applicants or employees or who base employment decisions on such personal information may be in direct violation of state constitutional privacy protections.

Furthermore, interrogations of applicants or employees about their sexual orientation may constitute a violation of the common law tort of privacy, being an intrusion into their private affairs.⁸⁸²

Thus, if a private employer in California collects, uses, or discloses information regarding the sexual orientation of an applicant or an employee, the private employer may be violating one or more of the following provisions of law:

- Common law tort of privacy
- State constitutional privacy protections
- Labor Code §1101 and §1102
- Various city ordinances on the subject

Protection against sexual orientation discrimination in private employment is also being achieved through voluntary methods. Some private employers have announced they they do not discriminate on the basis of sexual orientation; some have disseminated their policies in company publications, such as personnel manuals and company newsletters. The following companies, among others, have used this approach:⁸⁸³ American Broadcasting Company, American Express, American Motors, Anheuser Busch, Avon Products, Bank of America, Bell & Howell, Bendix, CBS Inc., Carnation Company, Adolph Coors, Firestone Tire, General Electric, Gibraltar Savings and Loan, Honeywell, INA Corp., Johnson and Johnson, Metropolitan Life Ins. Co., Oscar Mayer Co., J.C. Penney, Pitney Bowes, Rockwell International, Schlitz Brewing Co., Sears, Standard Oil of California, TRW, and United Airlines.

In the process of collective bargaining, some employers are now being faced with union demands to include "sexual orientation" in the non-discrimination agreement. This method is proving to be another source of

protection against sexual orientation discrimination in employment.

Through its public hearings and consultations with employees, union representatives, and employment discrimination consultants, the Commission has gathered evidence of sexual orientation discrimination in private employment. Such discrimination is often based upon prejudice, ignorance, and fear, even though employees with a homosexual orientation are as likely to be good workers as those with a heterosexual orientation. The fact that many employers do not know that some of their highly productive and valued workers are lesbians or gay men does nothing to dispel the traditional myths and stereotypes.

The Commission finds that both employers and employees would benefit from legislation creating a uniform statewide policy on sexual orientation discrimination in private employment.

THE COMMISSION RECOMMENDS that the Legislature amend the Fair Employment Practices Act to include "sexual orientation" among those categories of discrimination specifically prohibited by law.

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Housing Discrimination

The practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations has been declared to be against public policy and in violation of what was formerly called the Rumford Fair Housing Act.⁸⁸⁴ Non-discriminatory treatment is required in the following housing-related practices:⁸⁸⁵

- written or oral inquiries
- advertisements
- selection process
- application for financial assistance for purchase or construction
- terms and conditions of occupancy

The California Department of Fair Employment and Housing is charged with the responsibility to enforce the present law. If it is determined that the law has been violated, certain remedies may be available, including, but not limited to, the sale or rental of the housing accommodations and payment of actual and punitive damages.⁸⁸⁶

The Commission notes that "sexual orientation" is not presently included within the present law (Health and Safety Code §35700). However, the Legislature also has indicated that the Department of Fair Employment and Housing has the power and duty to "receive, investigate, and conciliate complaints alleging a violation of Section 51 . . . of the Civil Code [Unruh Civil Rights Act]."⁸⁸⁷

At the public hearing conducted by this Commission in Los Angeles, the Commission invited a representative of the Department of Fair Employment and Housing to testify regarding housing discrimination based on sexual orientation. Mr. Fernando Garcia, a staff attorney with D.F.E.H., advised this Commission that case law interpreting the Unruh Act has specified that, while the Act does not specify coverage of sexual orientation discrimination, the list of categories which are covered by the Act is merely "illustrative." Therefore, sexual orientation comes under the Act by virtue of the Act's covering all arbitrary discrimination.⁸⁸⁸

Mr. Garcia further testified:

We enforce the fair housing law of the state -- namely, what was previously the Rumford Fair Housing Law -- which is now contained within the Fair Employment and Housing Act. What people don't know is that we also enforce the Unruh Act.

[T]he Unruh Act fails to reference the fact, [and] [n]o diligent research would allow somebody taking a look at the Unruh Act to know that [a person] can actually go to the state and file a complaint. . . . [P]eople don't become aware that we do enforce the Act unless . . . they go to the Government Code which has no relation[ship to the Act and which] is not cross-referenced.

Two recent court decisions have confirmed that sexual orientation discrimination in housing transactions is prohibited under the Unruh Civil Rights Act. The most definitive ruling was handed down by the Appellate Department of the Los Angeles Superior Court on May 26, 1982, wherein that Court explained:⁸⁸⁹

In this case we must determine whether homosexuals as tenants in rental housing are included in the provisions of the Unruh Civil Rights Act (Civil Code §§51, 52). We hold they are.

The facts are not in dispute. They show the following: Appellant William Hubert is a quadriplegic and requires a 24-hour attendant. He leased an apartment from respondent and hired his attendant, appellant Cindy Kelly, a lesbian. Appellants were subsequently evicted from the apartment by respondent. Hubert and Kelly then filed suit against respondent, alleging they had been evicted from respondent's rental housing because Cindy Kelly was a lesbian and William R. Hubert associated with persons of homosexual orientation. Respondent's demurrer was sustained by the trial court. The court concluded that appellant's allegations did not state a cause of action under the Unruh Civil Rights Act (Unruh Act). Appellants refused to amend their complaint and the case was dismissed. This appeal followed .

The Unruh Civil Rights Act provides: "All persons within the jurisdiction of this state are free and equal, and no

matter what their sex, race, color religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. . . .

In Marina Point, Ltd. v. Wolfson (1982) 30 C.3d 721, the California Supreme Court held that under the Unruh Act landlords may not refuse to rent an apartment to a family solely because the family includes minor children. We find the discussion in Wolfson to be fully dispositive of the issue presented under the instant case. Accordingly, we hold that under the Unruh Act, landlords may not refuse to rent an apartment to a homosexual solely because of that person's sexual preference. In the Wolfson decision, the Unruh Act was held to prohibit all forms of arbitrary discrimination by business establishments . . . The term "business establishment" has been uniformly construed as including rental housing. . . . The Supreme Court's decisions, including Wolfson, hold that members of a particular class may not be discriminated against because of their status as members of that class. However, an exclusion is not prohibited by the Unruh Act if it is reasonably based upon the individual conduct of the person so excluded. . . .

We read the Wolfson opinion as clearly indicating homosexuals, as a class, are protected from arbitrary discrimination. Our reading is based upon several passages in which it is either stated or strongly indicated that homosexuals are covered by the Unruh Act.

In In re Cox 3 C.3d 205, the California Supreme Court stated that in Stoutman v. Reilly . . . , we recognized the right of homosexuals to obtain food and drink in a bar and restaurant. . . .

In Stoutman v. Reilly, supra, 37 C.2d 713, the California Supreme Court stated, although the statement is dicta in the case, that a proprietor of a public restaurant and bar would be liable for damages under Civil Code sections 51 and 52 if he excluded a homosexual based on that status alone.

When arbitrary discrimination is prohibited by statute, homosexuals have been held to be included in the groups

protected by such statutes. . . .

Based upon the foregoing, we hold homosexuals to be a class protected by the Unruh Act. Based upon the record before us and the nature of the facilities involved, we find no compelling societal interest which could justify an exclusion based upon class status as homosexual. . . .

Because homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act, the right to associate with members of the protected class, as a class, is likewise protected under the act. . . .

Furthermore, the California Supreme Court has itself observed that "an entrepreneur may find it economically advantageous to exclude all homosexuals, or alternatively all non-homosexuals, from his restaurant or hotel, but such a 'rational' economic motive would not, of course, validate the practice."⁸⁹⁰

Some California cities, such as San Francisco and Los Angeles, also have adopted ordinances prohibiting landlords from discriminating against renters on the basis of sexual orientation.⁸⁹¹

Thus, lesbians and gay men are protected under the law from being discriminated against by landlords. When landlords do not obey the law, the Commission urges that the Fair Employment and Housing Commission, the Department of Fair Employment and Housing, and local fair housing congresses and councils assist victims of such discrimination as they now assist victims of racial, ethnic, and sexual discrimination.

Pursuant to Mr. Garcia's testimony, the Commission on Personal Privacy learned that the literature that the Department of Fair Employment and Housing publishes does not indicate that the Department is available to handle housing complaints alleging sexual orientation discrimination. After being questioned by the Commissioners, Mr. Garcia recommended two ways to improve the present situation: (1) cross-reference the Unruh Act so that anyone looking up that Act would be made aware of the fact that the administrative processes of D.F.E.H. are available to investigate and conciliate cases which constitute arbitrary discrimination under that Act; and (2) increase public awareness of the Department's jurisdiction to handle housing cases involving sexual orientation discrimination by including specific mention of that jurisdiction in departmental literature.⁸⁹²

The Commission has also noted the frequent policy shifts in the Department of Fair Employment and Housing. On September 15, 1978, a directive was issued to staff members telling them not to handle cases involving "discrimination in housing against gay people."⁸⁹³ A year later, staff members were told they should accept gay housing cases.⁸⁹⁴ On January 18, 1982, this directive was revised, but staff was told to continue to accept gay cases.⁸⁹⁵ In the process of re-ordering priorities again, in March, 1982, a memo was sent out to all staff telling them not to accept such cases. After a number of civil rights representatives complained, a revision was sent out telling staff they should accept the cases.⁸⁹⁶ The problem just described seems to stem from a shortage of departmental resources. The department periodically creates policies of not accepting cases which it clearly has jurisdiction to handle, limiting its resources only to those cases falling under specific categories enumerated in either the Rumford Act or the Unruh Act. Since "sexual orientation" is not specifically mentioned in either act, the gay victims of housing discrimination have sometimes been deprived of assistance from D.F.E.H.

THE COMMISSION RECOMMENDS that the following actions be taken to ensure fair housing practices for lesbians and gay men:

- (1) A legislative amendment of the Unruh Civil Rights Act and Rumford Fair Housing Act, listing "sexual orientation" with other enumerated bases of discrimination which are prohibited;
- (2) A technical amendment to the Unruh Civil Rights Act indicating that the Department of Fair Employment and Housing has jurisdiction to receive complaints alleging violations under that Act;
- (3) An immediate update by the Department of Fair Employment and Housing of the literature that it disseminates to the public to indicate clearly that the Department has jurisdiction to investigate housing cases alleging sexual orientation discrimination; and
- (4) That the Housing Unit within the Department of Fair Employment and Housing engage in educational projects to increase community awareness of the protections already afforded under the Unruh Act with respect to sexual orientation discrimination.

The Commission on Personal Privacy has noted that state law authorizes the Fair Employment and Housing Commission to create advisory councils and to empower them to study discrimination in any field of human relationships.⁸⁹⁷

THE COMMISSION RECOMMENDS that the Fair Employment and Housing Commission establish a statewide Advisory Council on Sexual Orientation Discrimination. Its mandate should be to study the causes and manifestations of sexual orientation discrimination in California, especially as it occurs in the areas of employment and housing. That Council periodically should advise the Fair Employment and Housing Commission on the status of such discrimination and could recommend administrative and legislative actions to further the policy of this state to eliminate such discrimination.

The Commission also has noted that the Wolfson decision of the California Supreme Court clearly prohibits discrimination by landlords against renters who have children.⁸⁹⁸ Notwithstanding this judicial precedent, as a matter of setting priorities, the Department of Fair Employment and Housing has directed its staff members not to accept cases involving housing discrimination against renters with children.

Discrimination against persons who choose to raise children not only constitutes arbitrary discrimination within the meaning of various civil rights statutes, it also infringes on decisional privacy rights protected by article 1, section 1 of the California Constitution.

THE COMMISSION RECOMMENDS that the Department of Fair Employment and Housing include housing cases involving discrimination against renters with children within its list of "priorities."

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CONCLUSION

The Commission has researched and analyzed hundreds of statutes and court decisions involving various dimensions of privacy. The study of personal privacy is also an ongoing venture for other agencies, groups, and individuals concerned about the encroachment of technology on the right most valued in our modern civilization. Even as this Report was being prepared, the body of privacy-related law was expanding with new regulations and interpretations by legislatures and appellate courts in California and throughout the nation.

The spirit and letter of the law are together reflected in what is often called the "public policy" of the state. This term seems to imply a compilation, accumulation, and synthesis of legal principles, constitutional provisions, statutes, and court interpretations, generously mixed with an historical perspective and a general sense of fairness and justice. As a practical matter, public policy on any specific topic may be discovered in a concrete and systematic way.

Fundamental public policy is declared in the Constitution, and when the Constitution defines specific public policies, such policies must be paramount, although statutes may be to the contrary.⁸⁹⁹ For example, inclusion of privacy in the California Constitution as an "inalienable" right, and similar provisions in other state constitutions, underscore that public policy favors protection of personal privacy in those states.

Public policy may also be gleaned from legislative enactments. When the Legislature speaks on a particular subject over which it has the power to legislate, its utterance is the public policy of the state, and such statements are conclusive unless they contravene some constitutional provision.⁹⁰⁰

There are, however, many details not specifically treated either by constitutional provisions or by statutes, and, as to these, the public policy of the state is declared by the court of last resort.⁹⁰¹

In addressing the definition and scope of public policy, the California Court of Appeal has stated:⁹⁰²

The public policy of a state is found in its constitution, acts of the legislature, and decisions of its courts. . . . By the same token, where the federal Constitution and the decisions of the United States Supreme Court are made applicable to the states, the public policy there embodied becomes that of the states.

Officials often rely and depend upon general public policy -- that is, broad principles drawn from the rationale and spirit underlying explicit law -- to guide them when they are confronted with a particular problem not specifically addressed in legislative or judicial precedents. Both in exercising vested discretion and in interpreting general or ambiguous language, decision makers in the executive and judicial branches of government are properly guided by explicit declarations of public policy contained in constitutional and legislative enactments within the general field, as well as the implicit principles culled therefrom.

The Commission recognizes from its study and from all of the materials contained in this Report, that it is the public policy of the State of California to protect and defend the personal privacy of all its inhabitants and to encourage the elimination of discrimination based upon sexual orientation.

At its public hearings, the Commission heard testimony regarding a great number of issues involving invasions of privacy and sexual orientation discrimination. Specific recommendations have been made regarding a substantial number of those issues.

Primarily due to its 18-month life-span, the Commission was unable to address every problem brought to its attention. The Supplements to the Commission's Report, including the Transcript of Public Hearings, are valuable documents in that they explore some specific subjects which the Commission as a whole was unable to research thoroughly. Many of these subjects are deserving of additional study and the problems mentioned worthy of resolution.

The Commission dedicates this Report to those with responsibility for finding solutions to the ever more complex problems faced by people in a multi-faceted society, trusting that justice and wisdom in decision-making may be enhanced by a wider context of knowledge and understanding of existing law and public policy.

Commission on Personal Privacy
December, 1982