

March 23, 1990

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL  
HUMAN DIGNITY ORDINANCE  
INTRODUCTION

On January 17, 1990, the Council Committee on Rules, Legislation, and Intergovernmental Relations (Rules Committee) received public comment regarding a proposed "Human Dignity Ordinance" (HDO) which would ban discrimination in several different areas based on sexual orientation. The Committee directed the City Attorney to prepare an HDO to bring forward to the full Council for discussion and consideration. Absent specific Council direction, we have promulgated a model ordinance that satisfies the criteria given. The ordinance is a compilation of language gleaned from the citizen-proposed ordinance, from similar ordinances in other California cities, and from City Attorney legal research.

In addition to the ordinance, Council has been provided with options for certain sections if it chooses to amend the ordinance as presented. Those options are contained in the first section of this report. They were taken from similar ordinances in other California cities.

The Rules Committee also directed the City Attorney to answer specific questions raised by the Committee and members of the public. This report responds to those questions in the second section.

I  
HUMAN DIGNITY ORDINANCE OPTIONS

If Council desires to amend certain sections of this ordinance, it may choose among several options. Those sections are first listed separately below and each section is then listed with possible options included. Language in the proposed ordinance received from members of the community is in bold type.

1. DEFINITION OF EMPLOYER section 52.9601 subsection 3
2. DEFINITION OF SEXUAL ORIENTATION section 52.9601 subsection 9
3. ENFORCEMENT section 52.9608
4. LIABILITY section 52.9609
5. LIMITATION ON ACTION section 52.9610
1. DEFINITION OF EMPLOYER

There is no definition of employer in the citizen-proposed ordinance.

Option 1: As used in this Division, "Employer" includes any person regularly employing \_\_\_\_\_ insert any number or more persons.

Option 2: As used in this Division, "Employer" includes anyone regularly employing any number of employees.

## 2. DEFINITION OF SEXUAL ORIENTATION

Option 1: As used in this Division, the term "sexual orientation" shall mean heterosexual, homosexual, or bisexual orientation.

Option 2: As used in this Division, the term "sexual orientation" shall mean actual or supposed heterosexuality, homosexuality or bisexuality.

Option 3: As used in this Division, the term "sexual orientation" shall mean an individual's supposed or actual sexual preference for any lawful sexual activity.

## 3. ENFORCEMENT

Option 1: a. Civil Action. Any aggrieved person may enforce the provisions of this Division by means of a civil action.

b. Injunction.

1. Violation of this Division is declared to constitute irreparable injury. A court may issue an injunction when there is reasonable cause to believe a person is committing or proposes to commit any act in violation of this Division.

2. An action for injunction under this subsection may be brought by any aggrieved person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

Option 2: a. Civil Action. Any aggrieved person may enforce the provisions of this Division by means of a civil action.

b. Injunction.

1. Any person who commits an act in violation of this chapter may be enjoined therefrom by any court of competent jurisdiction.

2. An action for injunction under this section may be brought by any aggrieved person, or by any person or entity which will fairly and adequately represent the interests of the protected class.

## 4. LIABILITY

Option 1: Any person who violates any of the provisions of this Division or who aids in the violation of any provisions of this Division shall be liable for, and the court or a jury

shall award to the individual whose rights are violated, up to three (3) times the amount of actual damages but in no case less than two hundred fifty dollars (\$250.00) for each and every such offense as well as reasonable attorney's fees. The court or a jury may award punitive damages in a proper case.

Option 2: Any person who violates any of the provisions of this Division or who aids in the violation of any provisions of this Division may be liable for, and the court or a jury may award to the individual whose rights are violated up to three (3) times the amount of actual damages, but in no case less than two hundred fifty dollars (\$250.00) for each and every offense as well as reasonable attorney's fees. The court or jury may award punitive damages in a proper case.

Option 3: Any person who violates any provision of this chapter shall be liable to the aggrieved person for actual damages suffered, for reasonable attorney's fees, and for punitive damages in appropriate circumstances.

Option 4: Any person who violates any provision of this chapter shall be liable to the aggrieved person for actual damages suffered, for reasonable attorney's fees, and for punitive damages in appropriate circumstances; and, in addition

thereto, for an amount not less than                    insert any amount, nor more than                    insert any amount.

#### 5. LIMITATION ON ACTION

Option 1: Actions under this Division must be filed within one year of the alleged discriminatory acts.

Option 2: Actions under this Division must be filed within insert any time of the alleged discriminatory acts.

## II

### RESPONSE TO QUESTIONS

#### CITY OBLIGATIONS UNDER PROPOSED HDO

The ordinance, as proposed, allows any aggrieved person to bring an action. The language in the citizen-proposed ordinance, and those ordinances from other cities which allow the City Attorney to bring an action, has not been included. The City Attorney does not have the resources to intervene in private causes of action at the present time.

#### CIVIL CAUSE OF ACTION

There has been some uncertainty as to whether a municipality has the legal power to create either a third-party civil cause of action in tort or authorize civil sanctions to be enforced by state courts.

The California Court of Appeal (2d District) recently rejected challenges to a private action brought under West Hollywood's ordinance prohibiting discrimination against persons

with AIDS. *Jasperson v. Jessica's Nail Clinic*, 216 Cal. App. 3d 1099 (1989). Other California appellate courts have addressed this issue and have held that violation of an ordinance embodying a public policy is actionable by a private party in tort.

Case law neither specifically authorizes nor prohibits creation of private causes of action or court-imposed sanctions by a municipality. However, because the language in several cases refers to statutes and municipal ordinances that create actionable torts for violations, it is reasonable to presume that California courts will accept the creation by municipalities of third party civil causes of action and liability sounding in torts.

#### FRIVOLOUS CAUSE OF ACTION

A section prohibiting frivolous causes of action has been included in order to protect citizens from harassment, such as business people, apartment owners, employers and others, who have acted in good faith. California Code of Civil Procedure section 128.5(b)(2) defines frivolous as: "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

#### INSURANCE

The California Insurance Code comprehensively regulates the insurance business, including prohibitions against discrimination. (Insurance Code sections 679.70 et seq., 790.03(f), and 10140 et seq.) Insurance discrimination on the basis of sexual orientation is prohibited by California Code of Regulations, Title 10 section 2560.3. Therefore, insurance is not included in this ordinance.

#### LEGALITY

The proposed ordinance, as currently worded, will most likely withstand legal scrutiny. As mentioned elsewhere in this report, it is not preempted by state and federal law. Other cities in California, which have similar ordinances and who responded to our inquiry, report no legal challenges to the ordinances, with the exception of San Francisco.

As of March 21, 1990, a San Francisco superior court took under submission a sex discrimination lawsuit brought against Western Union by a private citizen under San Francisco's human rights ordinance. Defendant Western Union maintained that the San Francisco ordinance is preempted by state law and that a municipality lacks the power to create a civil cause of action. The City Attorney's office in San Francisco believes, however, that the ordinance is not preempted and that a municipality does have the right to create a private cause of action under appropriate circumstances.

## NEED FOR HDO

The question was raised by the Mayor at the Rules Committee meeting on January 17, 1990, as to why the City Attorney's office believes the proposed ordinance was needed at the local level. The City Attorney's office has rendered no opinion as to whether there is a need for such an ordinance at the local level. However, this office did respond, in a memorandum dated September 27, 1989, to the question of whether the citizen-proposed

ordinance was preempted by other laws. The ordinance before you is provided pursuant to direction of the Rules Committee to bring an HDO to the full Council for review.

## PREEMPTION

### 1. Federal Guidelines.

The 14th amendment of the U.S. Constitution provides that no State shall deny any person equal protection under the law.

The state action requirement embodied in the 14th amendment provides that its provisions do not extend to instances of discrimination by purely private individuals or entities.

In addition, the 1964 Civil Rights Act, 42 U.S.C. section 2000(a) prohibits discrimination of any suspect class, i.e., race, color, religion, sex or national origin. Homosexuals have not been included as a suspect class and are therefore not a protected group under this Act.

### 2. California Guidelines.

The Unruh Civil Rights Act, California Civil Code section 51, bars discrimination against all persons regardless of sex, race, color, religion, ancestry, national origin, or blindness or other physical disability in all business establishments of every kind whatsoever. However, the California Supreme Court has held that the Unruh Act is the codification of common law protections and that identification of those protected classes is illustrative and not restrictive. Several California cases have allowed additional protections to be included under the Unruh Act. The currently accepted premise is that the Unruh Civil Rights Act does not preclude local agencies from adopting additional protective laws in the area of business establishments.

Case law holds that unlawful discrimination in public employment is prohibited by the equal protection clauses of the state and federal constitutions. The California Constitution, article I, section 7(a) provides in pertinent part that: "a person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws." The equal protection clause of the California Constitution has substantially the same purpose and requirements as the 14th amendment of the Federal Constitution. Therefore, only

discriminatory state actions, not private acts, are prohibited under the California Constitution.

#### "PROPOSES TO COMMIT"

The ordinance proposed by a San Diego citizen's group, and some of the ordinances from other California cities, create liability for anyone who commits or proposes to commit any acts prohibited by the ordinance. The phrase, "proposes to commit" was deleted in our ordinance because such language, if challenged, would very likely be found unconstitutionally vague. A person may legally be prohibited from soliciting a crime, conspiring to commit a crime or violate a statute or from planning to an advanced degree to commit a crime or violate a statute, but merely proposing to commit an action cannot be prohibited, nor punished, by an ordinance. Due process of law requires that a statute or ordinance be sufficiently specific and certain to inform those subject to it what is required of them.

#### PUNITIVE DAMAGES

Statutory law (California Civil Code CC section 3294(a)) and case law allow punitive damages to be awarded wherever damages are properly imposed, except in breach of contract actions. The purposes of punitive damages, according to CC section 3294(a) are "for the sake of example and by way of punishing the defendant."

In order for punitive damages to be awarded, it must be proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice. CC section 3294(c) defines these terms:

1. "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
2. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
3. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

If a court were to find these conditions met, then punitive

damages may properly be awarded.

#### REASONABLE

The word "reasonable" as used in this ordinance is defined as that which a person of ordinary care and prudence would believe to be true. One of the options of the enforcement section states that "a court may issue an injunction when there is reasonable cause to believe a person is committing any act in violation of this Division."

#### REFERENDUM/INITIATIVE

The California Constitution, article II, sections 8(a) and 9(a) state in pertinent part that the initiative and referendum provide power to the electors to approve or reject statutes or parts of statutes. San Diego City Charter section 23 also preserves initiative and referendum authority.

In the City of Irvine, California, the "sexual preference" section of the Human Rights Ordinance was removed by initiative approximately one (1) year after the 1988 adoption of the ordinance.

#### ADDITIONAL SECTIONS

A section prohibiting retaliation, a section prohibiting frivolous actions, and a nonwaiverability section have been added to the citizen-proposed ordinance. They are used in ordinances of other cities and provide further protections to all citizens.

Respectfully submitted,

JOHN W. WITT

City Attorney

MKJ:mrh:144.1(x043.1)

Attachment

RC-90-21