

Admin.

November 2, 2004

## First Supplement to Memorandum 2004-46

**2004-2005 Annual Report: Unconstitutional Statutes**

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The staff draft of the *2004-2005 Annual Report* attached to Memorandum 2004-46 does not include the section relating to unconstitutional statutes. A staff draft of that section is set out below. The staff appreciates the assistance of Amber Pearce, a McGeorge Law School student, in preparing this material.

**Report on Statutes Repealed by Implication or Held Unconstitutional**

Government Code Section 8290 provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared<sup>1</sup> and has the following to report:

- No decision holding a statute repealed by implication has been found.
- No decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.<sup>2</sup>

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1. This study has been carried through 34 Cal. 4th 367 and 124 S.Ct. 2739 (2003-04 Term).

2. In *Dowhal v. Smithkline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 88 P.3d 1, 12 Cal. Rptr. 3d 262 (2004), the California Supreme Court held that Health & Safety Code § 25249.6 is preempted by the federal Food, Drug, and Cosmetic Act under the supremacy clause, Section 2 of Article VI of the United States Constitution, to the extent the state statute requires a drug label

warning that is inconsistent with the labeling requirements of federal law.

The Commission previously reported that the California Supreme Court, in *In re Reed*, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983), held Penal Code Section 290 unconstitutional as cruel or unusual punishment under Section 17 of Article 1 of the California Constitution insofar as the statute requires registration of persons convicted of soliciting “lewd or dissolute conduct” under Penal Code Section 647(a). See 17 Cal. L. Revision Comm’n Reports at 827 (1984). The court, in *In re Alva*, 33 Cal. 4th 254, 92 P.3d 311, 14 Cal. Rptr. 3d 811 (2004), has reversed itself and overturned *In re Reed*, holding that the statutory registration scheme is not punishment and therefore the “cruel or unusual” standard is not applicable.

Respectfully submitted,

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Executive Secretary