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Gay and
Lesbian Legal
Issues and
HIV/AIDS

Gay Men, Lesbians, and the Law - Part I

This is the first of two info sheets providing a brief overview of the treatment of gay men and lesbians by the law. It discusses progress achieved over the last 30 years and shows how, nevertheless, discrimination remains pervasive in the areas of criminal law, censorship, and protection from discrimination.

This is one of a series of nine info sheets on
Gay and Lesbian Legal Issues and HIV/AIDS.

A History of Discrimination (Info Sheet 1)
The Links Between HIV/AIDS and Homophobia (Info Sheet 2)
Gay Men, Lesbians, and the Law (Info Sheets 3 and 4)
Impact of Stigma and Discrimination (Info Sheets 5, 6, 7 and 8)
A Matter of Justice (Info Sheet 9)


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Progress

In the last 30 years, there has been substantial progress on gay and lesbian equality issues.

- The first significant breakthrough came in 1969 when the Canadian government passed an omnibus bill removing criminal sanctions against same-sex practices between consenting adults.
- In 1977, Québec became the first province to prohibit discrimination against gay men and lesbians.
- In 1979, prohibitions on the immigration of “homosexualists” were removed from the *Immigration Act*.
- During the 1980s and 1990s, most Canadian provinces amended their human rights acts to extend antidiscrimination protection to gay men and lesbians, and on 9 May 1996, after ten years of unkept promises, the *Canadian Human Rights Act* was also amended. In the context of HIV/AIDS, such protection is seen as a necessary corollary to protection against discrimination on the basis of physical disability, including HIV infection. As stated by the National Advisory Committee on AIDS:

One should not be able to defend discrimination against persons with HIV infection on the grounds that it was in fact discrimination related to a person’s sexual orientation and thus not expressly prohibited.

- While sexual orientation was not included as a prohibited ground of discrimination in the equality rights provision (section 15) of the *Canadian Charter of Rights and Freedoms*, section 15 was left open-ended to enable new grounds to be recognized over time. Courts have now ruled that section 15 of the Charter includes a guarantee of equality on the basis of sexual orientation. Gay men and lesbians are increasingly invoking the assistance of the courts to counter legal discrimination, and have obtained some significant victories for

gay and lesbian rights, particularly in the context of equal relationship recognition.

Discrimination Remains Pervasive

Despite this progress, discrimination remains pervasive in all the following areas: criminal law; censorship; protection from discrimination; benefits; children and parenting; immigration; and incapacity, wills, and estate litigation.

Criminal Law

Until very recently, it was illegal under the *Criminal Code* to have sex with someone of the same sex. Even today, a number of problems remain with the criminal law and the way in which it is applied to gay sexual activity. For example:

- Section 159 of the *Criminal Code* discriminates on the basis of sexual orientation.
- Other *Criminal Code* provisions (such as those dealing with public sex and child pornography) continue to be applied disproportionately against gay men and lesbians.
- In criminal cases, homosexual advances have sometimes been treated as “provocation,” thus justifying a shorter sentence for an assailant, even when a similar heterosexual advance in like circumstances would not be treated in this way.
- Hate crimes directed at gay men and lesbians continue to be widespread.
- Under the *Criminal Code*, it is not illegal to advocate genocide or hatred of gay men, lesbians, or people with HIV/AIDS.

Recommendations

- Section 159 of the Criminal Code should be revised. In particular, there should be a uniform age of consent for anal and vaginal intercourse.

- Police education programs must address discriminatory attitudes that lead to the unequal application of criminal laws.
- Legislation should be introduced to ensure that discriminatory attitudes cannot be used to justify homophobic violence by forming the legal foundation for a “provocation” defence.
- Serious consideration must be given to adding “sexual orientation” to the list of grounds on which the advocacy of genocide is prohibited.

Censorship

Gay and lesbian materials have been systematically censored as a result of the way in which Canada’s customs and obscenity laws have been applied. For many years, Canada Customs has actively suppressed information about the risks of transmission associated with anal sex, as a direct result of homophobia and discomfort about matters of a sexual, particularly homosexual, nature. Recent court decisions have acknowledged that by targeting lesbian and gay bookstores, Canada Customs has discriminated on the basis of sexual orientation.

The link between homophobia and HIV transmission is clear and direct. The active suppression of gay and lesbian materials has inhibited the ability of AIDS educators to speak forthrightly about same-sex sexual practices and to educate about risky behaviour. Had this safer-sex information been available and publicized in a responsible and open fashion, many lives might have been saved and the chances of controlling the spread of the virus in its early years would have been increased.

Recommendations

- Customs legislation and practice regarding the seizure of materials deemed to be obscene should be reviewed.
- Education workshops should be undertaken to ensure that Customs officers recognize their legal and constitutional duty not to discriminate in making decisions about what is or is not “obscene.”
- School boards need to ensure that young people receive a balanced education, including appropriate recognition of the contributions of gay men and lesbians to Canadian society, literature, and history. School curricula should not suppress acknowledgment of the existence of lesbians and gay men, but should recognize the diversity of human relationships and family forms. Age-appropriate information about safer sex should address sexual practices between people of the same sex in a non-judgmental way.

Protection from Discrimination

Gay men, lesbians, and people with HIV/AIDS are all too familiar with the difficulties experienced in the workplace and other spheres of their personal lives as a result of homophobia, AIDSphobia, cruel jokes, and thoughtless comments. Over the years, discrimination has been perpetrated by both the public and private sectors, often at the instigation of government itself.

In 1985, an all-party Parliamentary Committee on Equality Rights held public hearings across Canada. In its report, the Committee stated:

We were shocked by a number of the experiences of unfair treatment related to us by homosexuals in

different parts of the country. We heard about the harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression suffered by homosexuals. In several cities, private social clubs serving a homosexual clientele were damaged and the members harassed. Hate propaganda directed at homosexuals has been found in some parts of Canada. We were told of the severe employment and housing problems suffered by homosexuals.

While in recent years the situation has improved, there are ongoing concerns and problems:

- not all jurisdictions have amended their human rights legislation to protect gay men and lesbians from discrimination;
- some jurisdictions restrict protection by defining marital or family status to include only opposite-sex couples;
- open and hidden discrimination in the workplace remain pervasive;
- inadequate provision exists to protect transgendered people from discrimination; and
- generally, discriminatory attitudes persist even where human rights legislation has been passed.

Recommendations

- All provincial and territorial human rights acts need to include protection against discrimination on the ground of sexual orientation.
- Human rights commissions should review all provincial, territorial, or federal legislation and encourage governments to change discriminatory legislation so that it conforms

to the standards required by the Canadian Charter of Rights and Freedoms and human rights statutes.

- Employers and unions should ensure that workplace policies clearly specify that sexual orientation discrimination, prejudicial jokes and comments, and harassment are not permitted in the workplace. Personnel managers should be fully aware of their legal responsibilities, policies should be included in employment manuals, and training workshops should be held in workplaces.
- All human rights legislation should explicitly protect transgendered people from discrimination.
- Human rights protections in legislation must be accompanied by meaningful education programs, including the development of brochures, posters, workplace and public awareness campaigns to ensure that discriminatory attitudes can be redressed over time.

The information in this series of info sheets is taken from *Gay and Lesbian Legal Issues and HIV/AIDS: Final Report*, prepared by John Fisher, Ralf Jürgens, Anne Vassal and Robert Hughes for the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society. Copies of the report and info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged. However, copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **Ce feuillet d'information est également disponible en français.**

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