

SEXUAL ORIENTATION

At the present time, sexual orientation is not listed as one of the prohibited grounds of discrimination under the Canadian Human Rights Act.

Currently, Québec is the only jurisdiction which includes sexual orientation as a prohibited ground of discrimination. However, in addition to the CHRC, the Human Rights Commissions in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have all recommended that sexual orientation should be a prohibited ground. Ontario is now seeking to amend their Code to provide protection for homosexuals. A number of municipalities have added protection against discrimination on the ground of sexual orientation in the area of employment.

Concerns were expressed by some departments and groups and individuals that sexual orientation should not be a protected ground of discrimination for various reasons.

Prior to the release of **Toward Equality**, it was the position of the Human Rights Law Section that while sexual orientation was likely to be considered by the courts to be encompassed within the protection offered by section 15 of the Charter, it did not necessarily follow that there was presently a legal requirement to include it as a prohibited ground in the Canadian Human Rights Act since there are no court decisions stating that sexual

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orientation is encompassed. However, it was consistent with the approach adopted by the government to give a broad and generous interpretation to the guarantees in section 15 of the Charter.

In **Toward Equality**, in response to recommendations 10 and 11 of **Equality For All**, a commitment was made to the effect that "the government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction". At the same time, the response indicated that the Department of Justice is of the view that the courts will find that protection from discrimination based on sexual orientation is encompassed by the guarantees in section 15 of the Charter. This is premised upon the analysis that sexual orientation is analogous to the grounds listed in section 15. Some of the factors that were considered in making such an assessment were those which characterize the enumerated grounds such as;

- (a) a history of discrimination against the group, understood to involve the stigmatization of that group as inherently unworthy of equal treatment, which is the situation with respect to homosexuals;
- (b) the ground relates to an aspect of personhood, either beyond one's control or within the sphere where the Constitution protects the choices to be made. It appears as though homosexuality would fall within this category.

It is no longer possible, following **Toward Equality**, to take the position that sexual orientation should not be a prohibited ground of discrimination. Therefore, the sole question is whether it is necessary to add sexual orientation to the Human Rights Act to fulfill the government commitment made in **Toward Equality**.

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Concerns have been expressed that sexual orientation should not be added to the Canadian Human Rights Act because the Act is currently implemented in a fashion that does not respect the interests of the parties against whom a complaint is made. These concerns are being addressed as part of the review in suggestions for changes to the operation of the Act. *(fable)*

There is no other statute at the federal level which deals with discrimination in the same broad manner as the Canadian Human Rights Act. The Act provides protection with respect to employment, services customarily available to the public, and accommodation. Since it applies to both the federal public and private sector, it would encompass all areas of potential discrimination.

While it may have been possible to argue that there is sufficient protection in the public sector because of the Charter the government response in Toward Equality clearly indicates it does not think this is adequate. Furthermore, the private sector would still be free to engage in discriminatory practices. The Labour Code, for example, would not offer sufficient protection because it only encompasses labour practices. Other Acts could be amended such as the Canada Labour Code, the DND and RCMP Acts, and the Public Service Employment Act but there is a risk that this would be difficult and draw unwarranted attention to the issue. A separate Act to make sexual orientation a prohibited ground would have similar problems.

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Therefore, it appears that to comply with the commitment in **Toward Equality**, it would be necessary to add sexual orientation as a prohibited ground to the Human Rights Act.

Some consideration may have to be given to the definition of sexual orientation. Current cases and articles suggest that it would encompass heterosexuality, homosexuality and possibly bi-sexuality. There is no suggestion that it would encompass otherwise unlawful behaviour. It may be preferable to leave definition to the courts since there is no evidence in any cases that courts have sought to go beyond the above categories.

If sexual orientation is made a prohibited ground the normal provisions of the Act would apply. Therefore, in relation to employment, an individual could be refused employment if the employer could establish that this refusal was based on a bona fide occupational qualification. Similarly, in the provision of goods, services and facilities or accommodation the bona fide justification defence is available. As such, the protection offered on the basis of sexual orientation would be the same as for the other prohibited grounds in the Act including any new ones that may be added. Concerns have been expressed that these defences may not be broad enough to encompass all legitimate reasons for making distinctions. No desirable special defences have been put forward at the present time but work is being done on this question.

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